Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DR. ANTHONY VIAZIS,

Petitioner,

v.

AMERICAN ASSOCIATION OF ORTHODONTISTS, SOUTHWESTERN SOCIETY OF ORTHODONTISTS, GAC INTERNATIONAL, INC., AND LEO A. DOHN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

PROF. CLARK HAVIGHURST
Of Counsel
DUKE UNIVERSITY
BOX 90360
SCIENCE DR. & TOWERVIEW RD.
DURHAM, NC 27708-0360
(919) 613-7061

BRADEN W. SPARKS
Counsel of record
8117 PRESTON ROAD
SUITE 800
DALLAS, TEXAS 75225
(214) 750-3372

Counsel for Petitioner

112 pp

QUESTIONS PRESENTED

Summary adjudication may be avoided in a Sherman Act §1 conspiracy case where the evidence, taken as a whole and viewed in the light most favorable to the non-movant, "tends to exclude" the possibility of independent action. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 ~~(emphasis supplied)~~.

1. Did the Fifth Circuit err by employing a compartmentalized standard of review of the evidence, rather than viewing it as a whole, as *Matsushita* requires?

2. Did the Fifth Circuit err by employing a rule-of-reason standard of review of the conduct of a trade association in sanctioning truthful direct advertising to the public, thereby immunizing such conduct, in contravention of *Cal. Dental Ass'n. v. FTC*, 526 U.S. 756 (1999)?

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PARTIES TO THE PROCEEDINGS BELOW

The sole plaintiff-appellant below and sole petitioner in this Court is Dr. Anthony D. Viazis.

Defendants-appellees below and respondents in this Court are the American Association of Orthodontists ("AAO"), Southwestern Society of Orthodontists ("SWSO"), GAC International, Inc. ("GAC") and Leo A. Dohn ("Dohn").

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Petitioner, Dr. Anthony D. Viazis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 11, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, filed by Smith, J., is reported at 314 F.3d 758, and is reprinted in the Appendix hereto as Ap. A1-A23, *infra.*

The final judgment and memorandum decision of the United States District Court for the Eastern District of Texas (Brown, D.J.) have not been reported. They are reproduced in the Appendix hereto respectively as Ap. B1-B2 and C1-C41, *infra*.

JURISDICTION

The final judgment and memorandum opinion of the District Court were entered on September 24, 2001. The judgment of the court of appeals was entered on December 11, 2002. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."

STATEMENT

A. Underlying Facts

In 1991 Viazis, an orthodontist[1], designed and patented a triangular orthodontic brace bracket ("Bracket"). Viazis's research and independent studies suggest that his bracket is dramatically more effective than conventional designs,

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[1] "Orthodontics" is the science and art of straightening teeth. "Braces" is common parlance for a combination of wires and brackets used to straighten teeth. "Orthodontists" are dentists who have completed an additional two-year post-graduate program accredited by the American Dental Association ("ADA").

decreasing the time needed to straighten teeth by up to a year.[2]

In 1992, Viazis entered into a contract with GAC, a worldwide distributor of orthodontic products, to market his Bracket. For several years, the Bracket enjoyed growing sales to orthodontists around the world. Viazis traveled, lectured and published extensively at GAC's behest. In April 1996, Viazis sent a direct mail piece to several thousand households in Plano, Texas, a suburb of Dallas, claiming that his new technology was faster, less expensive and potentially safer. He also announced an upcoming public seminar promoting his brackets. Several of Viazis's competitors and fellow AAO members attended and taped the seminar.

Leo Dohn is the Chairman, chief executive officer and majority shareholder of GAC. At trial, Dohn testified that the Bracket was GAC's "hope for the future," and might be the single most successful bracket ever, gaining up to a 25% share of the $150 million worldwide brackets market. GAC advertised Viazis's Bracket in color, on the cover and in the back of its international catalog, sent to 90% of all domestic orthodontists and 20,000 practitioners worldwide.

B. The Dohn Letter

Shortly after the seminar, Dohn wrote Viazis a "smoking gun" letter that was admitted as the adoptive admission of a co-conspirator under FED. R. EVID. 801(d)(2)(B),[3] (Ap. E1-E3) Dohn told Viazis that several "major accounts" in the Dallas-Ft. Worth area had "threatened" GAC with a national

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[2] The trial court found, in this regard, that:

> "To be sure, the record contains evidence that the Viazis bracket may be a unique and innovative new type of orthodontic device exceeding, in some senses, the quality level of competitive devices." (Ap. C30).

[3] Ap. D2-3.

boycott because of his advertisement. He reminded Viazis that the AAO was "trying to insist that all new techniques and products be submitted for AAO or ADA approval before marketing," and "attempt[ing] to control the entry of all new products and ideas." Dohn expressed fear that the industry's attempt to resist the AAO's control would fail. He scolded Viazis, telling him that "direct advertisement of a medical device intended for use by a professional is the greatest breach of etiquette in orthodontics." As a result, he warned, GAC would soon consider "dropping" Viazis's product. Viazis could expect "severe repercussions" from his fellow AAO members including "legal or professional action."

Dohn angrily informed Viazis that "GAC's significant investment [in the Bracket] is now lost." He complained that Viazis may have "damaged [GAC's] overall reputation and sales, not only in Texas, but in the entire country." "Word of mouth will carry this story around the country," Dohn believed. He closed by starkly ordering Viazis to "destroy all literature" referring to GAC. "Under no circumstances come near our booth in Denver or attend our. . . reception" at an coming national AAO convention. (Ap., E1-3). Just as Dohn predicted, GAC terminated Viazis's marketing contract, the AAO ultimately suspended Viazis's membership for a year, and his bracket sales to orthodontists plummeted.

C. Plaintiff's Economic Testimony

Plaintiff's economist, Frederick Warren-Boulton, Ph.D., a former chief economist of the Antitrust Division of the U.S. Department of Justice, testified that the AAO had an economic motive to suppress the bracket, and that it also had an economic incentive to suppress Viazis's direct comparative advertising. Warren-Boulton opined that GAC was subject to the economic power of the AAO, and *estimated the harm to consumers resulting from suppression of the bracket at ~~$1.3~~ 3.2 Billion.* (Rec.864:16-17.)

D. Judgment as a Matter of Law

At the conclusion of Viazis's case-in-chief, defendants moved for judgment as a matter of law ("JMOL"). The District Court granted the motion. In its memorandum opinion, issued 10 months later, the Court stated that the evidence failed to demonstrate collusion on the part of GAC, even though "[Viazis] presented sufficient evidence of causation against all Defendants." (Ap. C39).

In granting JMOL, the District Court examined the evidence on a piecemeal basis, rather than as a whole. In doing so, it failed to draw factual inferences in the non-movant's favor, failed to view the evidence in the light most favorable to Viazis[4], failed to leave credibility determinations or legitimate inferences to the jury, and ignored the probative testimony of plaintiff's economist.

E. Appeal to the Fifth Circuit

On appeal, the Fifth Circuit noted the absence of an explicit agreement, finding that the Dohn Letter was merely "dealer-initiated contact." It found insufficient evidence of a nationwide boycott, concluding that GAC's conduct was arguably consistent with its independent self-interest, and, like the District Court, found "no connection" between the AAO and GAC. (Ap. 7). The Court found no evidence that the AAO ethics proceedings were a "sham" or that the standards applied "pretextually," rejecting collusion on the part of the AAO, despite lack of any proof that Viazis's ad was untruthful.

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[4] The District Court gave lip service to these requirements of FED.R.CIV. PROC. 50(a)(2), (*see infra*, Ap. C5), but failed to apply them.

REASONS FOR GRANTING THE WRIT

I. Use of a compartmentalized standard of review conflicts with the decisions of this Court and other Circuits.

Certiorari should be granted in this case because the Fifth Circuit's decision, ostensibly applying *Matsushita* and *Monsanto*, erroneously compartmentalizes the evidence, fails to view the evidence in the light most favorable to the non-movant, fails to resolve ambiguities or draw inferences in the non-movant's favor, ignores clear evidence of a tacit agreement, and ignores the economic evidence, both as to plausibility and motivation.

A. *Matsushita* requires that if the evidence, *viewed as a whole*, "tends to exclude" independent action, the case must be submitted to the jury.

Without reason, both courts below decline to apply this Court's explicit test for determining the sufficiency of the evidence of a horizontal antitrust conspiracy. A party opposing summary adjudication in such cases must demonstrate a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray Right Serv. Corp.*, 465 U.S. 752, 768 (1984); *Masushita Electric Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The evidence must "tend[] to exclude the possibility" that actions allegedly in concert were in fact undertaken independently. At least some of the evidence may be ambiguous, and all of it may be circumstantial. *Id.* The substantive law limits the inferences that may be drawn from ambiguous evidence, as well as the drawing of inferences to support a claim that makes "no economic sense." *Matsushita*, 475 U.S. at 588. Once again, however, where the alleged concert is logical, the courts require no more than normally probative evidence. *Id.* at 587, 596-98. If the actions of putative conspirators make more sense as actions taken in

concert than as independent moves in a competitive market, the inference of conspiracy may be drawn. *Id.*

It is axiomatic that in reviewing circumstantial evidence allegedly probative of conspiracy, trial courts must avoid "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). In addition, "[a]cquiescence in an illegal scheme [such as was undertaken here by GAC] is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948), *quoted in MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 973 (7th Cir. 1995) (Posner, J.).[5]

Nor need the evidence of an agreement be explicit. This Court has long recognized that a tacit horizontal conspiracy may be unlawful under the Sherman Act. *See, e.g., Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators"). Collusion is unlawful so long as the parties have culpably "deprive[d] the marketplace of the independent centers of decision making that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). This court has also long recognized that conspiracy can be proved by circumstantial as well as direct evidence. *See, e.g., Eastern States Retail Lumber Dealers' Ass'n*, 234 U.S. 600, 612 (1914) ("conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done"); *Interstate Circuit*, 306 U.S. at 221; *American Tobacco v. United States*, 328 U.S. 781 (1946).

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[5] "[A] Section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion." *MCM Partners, supra*, 62 F.3d at 973.

In sum, neither *Matsushita* nor *Monsanto* permits a court to summarily dispose of a complaint that makes "economic sense" (*Matsushita*, 475 U.S. at 587) and is supported by evidence probative of conspiracy. Yet the courts below, by segregating and parsing away discrete facts one-by-one, evade or fail to apply these standards.

The lower courts also place false emphasis on *Monsanto*. In the 1984 *Monsanto* decision, a plaintiff claimed that his termination as a dealer was the result of a vertical price-fixing conspiracy between a manufacturer and its other dealers, his competitors. Recognizing that manufacturers were likely to have procompetitive reasons for limiting price competition among their dealers, *Monsanto* established a high standard of proof in such cases, so that terminated dealers could sue manufacturers only in cases where the ancient Per Se rule against resale price maintenance applied.[6] The *Monsanto* Court stressed that requiring evidence "tending to exclude" independent action was essential in order for manufacturers to be able to pursue competitive interests without fear of unwarranted antitrust liability to dealers.[7]

As suggested above, direct evidence is unnecessary, although it is arguably present here, in the form of Dohn's "smoking gun" letter. "Only rarely will there be direct evidence of an express agreement in conspiracy cases." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.,*

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[6] The decision in *Monsanto* was an important step in this Court's ultimately successful attempt to limit the reach of the time-honored, but much-criticized, holding in *Dr. Miles Medical Co. v. John D. Park & Sons Corp.*, 220 U.S. 373 (1911) (establishing per se rule against resale price maintenance). *See also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (limiting per se rule of Dr. Miles to agreements on specific prices, thus leaving manufacturers free to encourage dealers to compete on service and other non-price elements, with potential benefits to interbrand competition).

[7] See also notes 13-14 *infra* and accompanying text.

381 U.S. 676, 720 (1965). As *Monsanto* recognized, circumstantial evidence alone may be dispositive. 465 U.S. at 765-66. Indeed, this Court has repeatedly held that unlawful understandings may be tacit and can arise without verbal communications. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 137, 142-43 (1966) ("It has long been settled that an explicit agreement is not a necessary part of a Sherman Act conspiracy.") Yet the absence of proof of an explicit, unambiguous or sufficiently explicit tacit agreement forms the core logic of the lower courts' misapplication of the law.

B. Piecemeal review and the case at bar – erroneous summary denial of an unlawful conspiracy

In direct contradiction of the "tends to exclude" test of *Matsushita* and its progeny, the courts below compartmentalize the evidence, conduct a piecemeal analysis, fail to view the overall conduct of the defendants in the light most favorable to the non-moving party, and draw multiple adverse inferences in the light least favorable to the non-movant. This approach results here in the denial of the fundamental right to a trial by jury in an important case.

The District Court's compartmentalized approach may be easily seen in its 42 page memorandum opinion, rendered 10 months after granting JMOL. (Ap., C1-C41). The opinion segregates the defendants, isolates the various aspects of their conduct, draws every available adverse inference, examines them in a clearly unfavorable light, and fails to identify many countervailing inferences. For example, with respect to the Dohn Letter, which the District Court discussed in dismissive tones (as described further below), that Court held that "all one can reasonably say Viazis did was to offer a letter…where [sic] Dohn stated that several major Dallas-area accounts had threatened GAC…because they associated Viazis's marketing methods with GAC." (Ap. C8). The most

cursory review of the Dohn Letter immediately establishes that the Court's bland reading of this document is entirely self-serving. (Ap. E1-3). The District Court further finds, specifically, that the Dohn Letter "cannot reasonably be read as much *indirect* evidence of collusion." (Ap. C20 n.5). Surprisingly, the trial court gratuitously avoids or ignores the inferences obviously to be drawn from Dohn's many connected references to orthodontists' "threats," the power of the AAO, his fear of national reprisal, his personal involvement on an AAO science committee, his expectation of sharp reprisals at the upcoming meeting, the AAO's ongoing attempt to "control the entry of all new products and ideas," its effort to cause manufacturers to submit their new products to the AAO or ADA for approval "before marketing," the industry's likely inability to counteract the AAO's control, and GAC's feared "loss of overall reputation and sales not only in Texas, but the entire country," not to mention Dohn's accurate prediction of "professional action" and of the loss of Viazis's marketing contract. None of these facts are even mentioned, much less explained away, by either lower court.

Having arbitrarily dispensed with the single most probative piece of evidence in the Petitioner's case, *i.e,* the Dohn Letter, and of the obvious inferences of collusion to be drawn on the part of GAC, the District Court then turns its attention to the AAO and related entities. As in the case of GAC, the District Court segregates these entities, fails to examine the Dohn Letter's *explicit* reference to future "professional action" by Viazis's competitors as evidence of a connection between the AAO and GAC, ignores the absence of proof of any untruthful advertising, and holds that "the mere sanctioning action of the AAO" does not constitute the requisite concerted action. (Ap. C21). Finding that there is insufficient evidence that the AAO's advertising rules are a "mere sham," the Court ignores its own acknowledgement that the record contains evidence of the bracket's superiority,

(Ap. C30), as well as its own statements that "there is evidence that the AAO took the action it did in furtherance of the objectives that Plaintiff has alleged in his lawsuit." (Rec. 363:21-24.) On this basis, the Court finds no collusion on the part of the AAO.

Turning finally to the issue of unreasonable restraint, the District Court concludes that, despite the suggestion of the Bracket's exclusion from the market, (Ap., C30), *FTC v. Cal. Dental,* 526 U.S. 756 (1999) mandates a full-blown rule-of-reason analysis in such cases, *id.,* a-C27, and holds further that the evidence of coercion does not satisfy the test of Per Se unreasonableness in *Indiana Federation of Dentists,* 476 U.S. 447 (1986). (Ap., C35).

On appeal, the Fifth Circuit holds that there is no "explicit refer[ence]" to an unlawful agreement. (Ap., A11-12). The Dohn Letter is mere evidence of "dealer-initiated contact." *Id.*, (Ap. A 13-14). Evidence of a nationwide boycott is insufficient, and GAC's "dropping" of the Bracket is arguably consistent with [GAC's] independent self-interest. *Id.*, (Ap. A15.) Neither "threats" nor the AAO's arguably pretextual sanction of Viazis is evidence of collusion with GAC, in the absence of proof of a "connection" with GAC, despite the direct references to both in the Dohn Letter. (Ap. A17; emphasis supplied). Evidence that the AAO ethics proceedings were a "sham," or that the standards applied "pretextually," is insufficient, although Viazis's claims were not shown to be untruthful,[8] and the District Court specifically alluded to evidence that his product was

[8] To prove conspiracy, Viazis relied in part on the following *sub rosa* statement of an AAO ethics panel member: "It's not your work, Tony – next time, play by the rules," which the District Court referred to as "evidence of a conspiracy." (Rec.395-98.) The Court of Appeals ignored this inference, although "suspicious," because "it does not *explicitly* reference any agreement." (Ap., A18). Under this tortured analysis, only a plea of guilty would qualify.

"superior." *Id.*, (Ap. A17). Since the case involves restrictions imposed on advertising by a professional association, the Court also concludes that mere demonstration of a "steep decline in sales" to orthodontists is insufficient evidence of coercion. (Ap. A21). Likewise, proof of "drastic reduction" in the number of orthodontist purchasers is insufficient. *Id.*

In order to see how this erroneous standard produced an erroneous result, it is necessary to briefly review the evidence and to observe the obtuseness of the lower courts' efforts, despite their paying verbal homage to *Matsushita* and *Monsanto*.[9] In fact, the undue skepticism exhibited here may be symptomatic of a widespread tendency in the lower courts to read *Matsushita* and *Monsanto* as invitations to exercise creativity in explaining away evidence suggestive of a conspiracy. [10]

It is black-letter law that "conscious parallelism," standing alone, does not establish conspiracy, *Theatre Enteprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954), and that something more is needed – what some courts and commentators have called "plus factors." In this case, the circumstantial evidence includes suspiciously parallel conduct, both by the orthodontists themselves, who have almost unanimously refused to purchase the Bracket, and by GAC, which refused to continue marketing it. Another possible conspiracy, not considered by the lower courts, is

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[9] This Court has on previous occasions been willing to examine individual antitrust cases in order to provide needed guidance. *See, e.g., Brooke Group*, 509 U.S. at 230 ("It is not customary for this Court to review the sufficiency of the evidence, but we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard . . . justify the required expenditure of judicial resources.").

suggested by the parallel policies of orthodontists and of GAC, as well as other manufacturers, with respect to marketing directly to consumers – as many prescription drugs are regularly marketed today, as to many far more complex products, and with added informational benefits to consumers.[11]

Among other essential "plus factors" in any antitrust conspiracy case is a motive to conspire. Although the courts below never observed it, orthodontists have a powerful economic incentive to collectively discourage each other from using the Viazis bracket, which (the court of appeals had to assume) would straighten patients' teeth with less discomfort, fewer visits to the orthodontist, and a lower total cost. GAC, too, had a powerful motive to join the conspiracy – namely fear of what would happen if it didn't, if it took an independent course. Petitioner's most powerful single item of evidence, the Dohn Letter, dramatically reveals that GAC anticipated an orchestrated reaction by orthodontists and their associations if it persisted in doing business with Viazis once "word of mouth" carried the "around the country" the story that he had violated "professional etiquette" in Dallas.

Another important "plus factor" widely employed in antitrust conspiracy cases is parallel conduct that would make no sense for an individual competitor unless his competitors were generally committed to act in the same fashion. The crucial question is whether the action each party took was in its commercial self-interest without regard to what its competitors did. Here, there was evidence from which a jury could easily find that individual orthodontists would have been crazy not to use the superior Viazis bracket if their

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[11] For recent findings of health benefits from such advertising, see articles reproduced at <www.healthaffairs.org/WebExclusive/Pharma_Web_Excl_022603.htm>.

competitors were likely to use it.[12] Similarly, GAC's decision to stop marketing Viazis's bracket made sense only because, as the Dohn Letter shows, GAC faced a potential boycott of all of its orthodontic products if it failed to go along with the orthodontists' conspiracy.[13] Thus, evidence in the record would seem to do more than merely "*tend*[] to exclude the possibility of independent action." Matsushita, 475 U.S. at 586. Once it is accepted that Viazis's bracket was superior to all others (as it must be in the posture of the case), *only* conspiracy – a meeting of the minds on a policy of barring the bracket from orthodontic practice – can explain the choices that the orthodontists and GAC made.

The Court of Appeals hypothesized that GAC might have concluded on its own – threats or no threats – that Viazis's advertising was so obnoxious that it could no longer be associated with him. (Ap. A6). It should be no basis for ruling against Viazis as a matter of law, however, that GAC *may* have decided on its own to stop marketing the Viazis bracket or decided at an earlier date to go along with the

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[12] *Cf. Eastern States Retail Lumber Dealers' Ass'n*, 234 U.S. at 624:

> A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. . . . [But, w]hen the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress . . . .

[13] The Dohn Letter reported multiple threats from orthodontists, and by clear inference, the AAO, that "they will never again purchase from GAC," on a national scale. For an individual customer to carry out such a threat would be against his self-interest (as well as futile) unless a significant number of other customers could also be counted on to bring pressure on GAC.

orthodontists' strong preference for withholding useful information from consumers. Petitioner's evidence concerning GAC's actions was strong enough, particularly when seen in the context of his other proof, to make GAC explain itself to a jury. In any event, those corporate choices, independent though they may have been in some sense, were decisions to join and support the orthodontists' conspiracy – precisely the kind of choice that antitrust law should seek to deter. A decision to market one's products in a way dictated collectively by one's customers is precisely *not* the kind of "marketing strategy" that this Court sought to enable manufacturers to adopt by its ruling in *Monsanto*.

Indeed, in a major error that alone would justify granting this petition, the court of appeals seriously misread this Court's holding in *Monsanto* about the relevance of customer complaints to a supplier in an antitrust case. To be sure, the *Monsanto* Court expressly held that complaints by a supplier's customers about the marketing methods of another customer (their competitor) were not sufficient evidence in themselves of a vertical conspiracy between the supplier and the complaining customers to survive a motion for a directed verdict, 465 U.S. at 764, and both lower courts relied heavily on this aspect of *Monsanto* and similar cases[14] in holding that the complaints received by GAC concerning Viazis did not help to prove a conspiracy against him. But Viazis relied on the multiple threats directed to GAC as only one of several "plus factors," not as the *sole* basis for finding a conspiracy –

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[14] The court cited the following cases, all of which involved dealer complaints about terminations or other actions by a supplier and were therefore distinguishable from Viazis's case on the grounds explained in the text: *Lovett v. Gen. Motors Corp.*, 998 F.2d 575 (8th Cir.1993); *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.*, 988 F.2d 587 (5th Cir.1993); *Bailey's, Inc. v. Windsor Am., Inc.*, 948 F.2d 1018 (6th Cir.1991); *Culberson, Inc. v. Interstate Elec. Co.*, 821 F.2d 1092 (5th Cir.1987); *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905 (4th Cir.1986).

which is all *Monsanto* would preclude. *Id.* at 764. Moreover, the record in this case would allow a jury to find that GAC was hearing, not just "complaints" by individual customers, but threats of collective boycott if it persisted in dealing with Viazis.

Most importantly, the lower courts failed to appreciate that, as observed above, the *Monsanto* Court had a special reason, not remotely present in this case, for making it difficult for the plaintiff, a terminated dealer, to prove a conspiracy.[15] Unlike vertical conspiracies to practice resale

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[15] As noted *supra*, the *Monsanto* Court was concerned that viewing dealers' complaints to a manufacturer as evidence tending to prove a vertical conspiracy with the manufacturer "could deter or penalize perfectly legitimate conduct" -- namely, the adoption of a "particular marketing strategy" using "non-price restrictions." 465 U.S. 761-64. The Court also anticipated harm to inter-brand competition if a manufacturer could not act on information supplied by one dealer about another dealer's practices in selling the manufacturer's product. While not wanting to overrule the ancient rule against resale price maintenance, the Court clearly wanted manufacturers to be free, in practice as well as theory, to encourage dealers to compete by providing customer services and promotion rather than by price cutting alone: "If an inference of such [a vertical price] agreement may be drawn from highly ambiguous evidence [such as dealer complaints about price cutters], there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded." *Id.* at 763, citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (adopting rule of reason test for manufacturers' territorial restrictions on dealers, in view of overriding importance of inter-brand competition); *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (declaring importance of preserving manufacturer's right to choose its dealers). It is ironic that the court of appeals cited Colgate's endorsement of a manufacturer's "right . . . freely to exercise his own independent discretion," *id.* at 307 (emphasis added), in answer to Viazis's claim that GAC's decision not to deal with him was either coerced or taken in concert with its customers.

In this case, the Court of Appeals rejected Petitioner's prediction that this Court would have no policy compunctions of the kind seen in *Monsanto* about exposing the orthodontists, the AAO, and GAC to conspiracy charges. Indeed, it missed the point entirely, declaring that,

price maintenance, restraints inhibiting the introduction of efficient new technologies should not be especially difficult for private plaintiffs to prove. In any event, this case is not at all about a manufacturer's freedom to limit competition among its dealers in order to compete more effectively against other brands or about letting manufacturers act freely on information received from their dealer networks.

Still another key "plus factor" to be looked for in finding an antitrust conspiracy is the existence of good opportunities for the alleged conspirators to communicate among themselves so as to make sure they are all on the same page and to coordinate their anticompetitive actions. Here, Petitioner's evidence (e.g., the Dohn Letter) showed that orthodontists have a highly sensitive network for sharing competitively significant information, including influential professional organizations that hold regular meetings and otherwise facilitate the exchange of assurances necessary to make a nationwide conspiracy work. Most crucially, the orthodontists have the AAO, which launched an official investigation of Viazis and eventually sent out the word to the orthodontics profession that he should be regarded as an unethical orthodontist who had misrepresented his product. On this record, a jury could easily disbelieve the AAO's judgment on Viazis's advertising and self-promotion. It is

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like the manufacturers hypothesized in *Monsanto*, GAC was simply pursuing a "marketing strategy," one that eschewed direct-to-consumer advertising. (Ap. A5 n.6). On the basis of Petitioner's evidence, however, a jury could find that that "strategy" was not adopted voluntarily by GAC in its independent self-interest, but was adopted instead either to curry favor with, or to avoid repercussions from, the orthodontists' cartel; either way, the marketing strategy adopted by GAC was in its economic self-interest only because, as the Dohn Letter shows, its customers were capable of effective concerted action if displeased. Because GAC did not choose to defend its actions on the ground that it was coerced to join the orthodontists' conspiracy, *see* 6 Areeda & Hovenkamp, ANTITRUST LAW 1408f3 (2d ed. 2003), it should be treated as a voluntary participant in their boycott of the Viazis bracket.

highly probative of conspiracy, for example, that only orthodontists, not ordinary dentists, refrained from using Viazis's bracket on the basis of the AAO's opinion.[16] It is also striking that the AAO's sanctioning of Viazis for the way he advertised his orthodontic practice in a single, local market for professional *services* effectively discredited a *product*, the Viazis bracket, with orthodontists nationwide. Once the AAO acted against Viazis, orthodontists everywhere could safely assume that their principal competitors would not be using his bracket – so that they ran no risk in boycotting it, too.

A particular instance of the jaundiced view taken of the evidence by the court of appeals was its insistence that Viazis could succeed only if he could prove that the AAO itself (or persons with apparent legal authority to act on its behalf) had threatened GAC. (Ap., A15, *infra.*) But GAC had no such concern as to whether the AAO as an organization was officially behind the threats. Indeed, the Dohn Letter expressed a more general fear about responses by a "hysterical," "overly conservative" profession, and anticipated not only a loss of business from local orthodontists but also "some very sharp comments both from the AAO *members* and fellow suppliers." *Id.* (Emphasis supplied.) In addition to GAC's expectation of "severe repercussions" from "neighboring professionals," Dohn warned that Viazis's conduct had "greatly delayed any acceptance of your technique and may have *entirely destroyed its future.*" *Id.* (Emphasis supplied.) Instead of local reprisal, "GAC/Tomy [has] made a significant investment which is *now lost.*" *Id.* (Emphasis supplied.) Moreover, Viazis's single, localized ad campaign "may have even seriously damaged our overall reputation and sales, not only in Texas, but the *entire country.*" *Id.* (Emphasis supplied.) Clearly, Dohn's statements

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[16] The lower courts never focused on this fact despite its clear tendency to establish that the orthodontists were making collective, not individual, choices.

manifest his belief that the AAO had joined in the conspiracy – indeed, when it was admitted into evidence on this very basis, pursuant to FED. R. EVID. 801(d)(2)(B), the District Court stated that "[a] careful reading of the [Dohn] letter demonstrates that Dohn and GAC believed that threats had been made. (Ap., D3). (The Order admitting the Dohn Letter is reproduced in the Appendix, *infra.* at Ap. D1-4.) In admitting the letter, the District Court concluded that the threats were made by "GAC's accounts (orthodontists), [and] that GAC's accounts linked GAC with Viazis." *Id.* The District Court studiously ignored Dohn's repeated references to the AAO, as contained in the letter. In addition, when Viazis offered evidence that Dohn warned Viazis away from GAC's booth so as not to incur the wrath of AAO officials, the Court again compartmentalized this fact and ignored any negative inference from it, finding that "[t]here is simply nothing sinister about AAO officials and orthodontists having been near an orthodontic manufacturer's booth at an orthodontics convention." (Ap., C14). Exactly when the AAO became an active participant in the conspiracy, liable for the damages it caused, should not be an issue, because it clearly joined it at some point, officially administering the profession's coup de grace in 1997 – an outcome, i.e., "professional action," that Dohn predicted, (Ap., E2) – another connecting link between the AAO and GAC that the District Court ignored.

Another "plus factor" present here is the suggestion that that market is conducive to collusion. Thus, despite the technological superiority of the Viazis bracket and its increasing attractiveness to the subset of ordinary dentists who engage in straightening teeth, hardly any orthodontists were using it at the time of trial. It is hard to imagine any clearer proof that the defendants succeeded in collectively compromising the competitive process of decentralized decision making in the market for orthodontic services and brackets. The lower courts in this case, perhaps sensing and

riding a wave of hostility toward private antitrust conspiracy claims in the federal courts, simply overlooked the serious harm to consumer welfare caused when orthodontists, with the help of co-conspirators such as GAC and the AAO, deny their patients access to a better, cheaper technology.[17]

Petitioner submits that the errors of the lower courts in evaluating the evidence of conspiracy in this case are the direct consequence of a systematic misunderstanding in many federal courts (though not, at the moment, in the Seventh Circuit) of the teachings of *Matsushita* and *Monsanto*. This case presents this Court with a much-needed opportunity to impress upon the judiciary the importance – in a world where corporate wrongdoing happens (sometimes on a prodigious scale) – of taking plausible allegations of antitrust conspiracies very seriously, even in private damage suits. If such wrongdoing is to be effectively deterred, courts must appraise the evidence offered to prove such conspiracies in an evenhanded and realistic way, assessing its probative value with due appreciation of conspirators' ability to project innocence and independence while hiding most of their true motives and interactions.

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[17] In previous cases, this Court has been impressed by the adverse effects on consumer welfare that occur when firms voluntarily offer poorer quality goods and services. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-11 (1985) (defendant's willingness to offer inferior product and to "sacrifice . . . consumer good will" deemed evidence of improper purpose); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.28 (1992) (customer unhappiness with defendant's service viewed as supporting possible finding of predatory purpose).

C. The Circuits are split as to whether summary review of the evidence of an antitrust conspiracy should be done on a compartmentalized basis

Six circuits hold that the non-movant's evidence should be analyzed as a whole for the purposes of summary adjudication and not be tightly compartmentalized to see if it supports an inference of concerted action. *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, (1st Cir. 1979) (*non-movant's evidence evaluated as a whole to see if together it supports an inference of concerted action) (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962); *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (2nd Cir. 1989) (non-movant's evidence evaluated as a whole to see if together it supports an inference of concerted action); *AD/SAT, Div. of Skylight, Inc. v. Associated Press,* 181 F.3d 216, 225-26 (2nd Cir. 1999) (same); *In re Baby Food Antitrust Litigation,* 166 F.3d 112, 124 (3rd Cir. 1999) (same); *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 662-63 (7th Cir. 2002) (same); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327 (8th Cir. 1986) (same); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,* 203 F.3d 1028, 1035-36 (8th Cir. 2000) (same); *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1157 (9th Cir. 1988) (same); *In re Citric Acid Litigation*, 191 F.3d 1090, 1096 (9th Cir. 1999) (same).

Five circuits, including the Fifth Circuit, as demonstrated here, have impermissibly fragmented the plaintiff's circumstantial evidence in determining whether it supports an inference of concerted action to overcome summary disposition. *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 102 (4th Cir. 1987) (each individual piece of evidence evaluated on its own for consistency with inferences of permissible conduct versus concerted action); *Virginia*

Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 281-83 (4th Cir. 2002) (same); *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 739-40 (6th Cir. 1999) (same); *Wallace v. Bank of Bartlett*, 55 F.3d 1166,1168-70 (6th Cir. 1995) (same); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1029-30 (10th Cir. 2002) (same); *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1519-20 (11th Cir. 1988) (same).

D. The Compartmentalized review standard conflicts with the Seventh Circuit's recent decision in *HFCS and* encourages inappropriate and unwarranted skepticism toward antitrust conspiracies

Recently, the court of appeals for the Seventh Circuit reversed a grant of summary judgment in favor of the defendants, holding the plaintiffs' circumstantial evidence sufficient to permit a jury to find an actual agreement on prices. Although acknowledging that "no single piece of evidence . . . is sufficient in itself to prove a price-fixing conspiracy," Judge Posner stated, "[T]hat is not the question. The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." 295 F.3d at 661. Noting some confusion in the case law of other circuits as to the "largely if not entirely superfluous" distinction between direct and circumstantial evidence, he asserted that even ambiguous statements "are not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." *Id.* at 662.

In *HFCS*, the Seventh Circuit employed a standard of proof under which the plaintiffs' evidence is viewed in its entirety, rather than item-by-item, without overt skepticism, and from a perspective informed by basic economics. In

abandoning the latter approach, the lower courts' analysis reveals the same erroneous approach to the weighing of conspiracy evidence that Judge Posner detected in the law of other circuits. In order to prevent unwarranted emasculation of the antitrust laws, this approach should be rejected.[18]

II. The Fifth Circuit's decision erroneously requires full-blown rule-of-reason analysis of any trade association's use of its ethics rules to restrain truthful advertising, an unwarranted extrapolation of *FTC v. California Dental Ass'n.*

In *FTC v. California Dental Ass'n*, 526 U.S. 756 (1999) (hereinafter "*CDA*"), a 5-4 majority of this Court discussed the nature and quantum of evidence needed to invalidate a professional association's restrictions on professional

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[18] As noted earlier, Judge Posner's method of evaluating the evidence of antitrust conspiracy in *HFCS* provoked three petitions to this Court decrying the conflict in the circuits. That the approach employed by Judge Posner in *HFCS* is well-established – and has been employed to good effect – in the Seventh Circuit is made clear by several earlier decisions. *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 788 (7th Cir. 1999) (in a case alleging a plausible theory of conspiracy, "the interpretation of ambiguous documentary evidence of collusion is for the jury"); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir.1997). In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999), the court found sufficient circumstantial evidence to reverse a grant of summary judgment for several paving companies that had been charged by another ("maverick") paving company with collectively getting asphalt suppliers to refuse to deal with it in order to prevent it from competing with their cartel. The court found evidence that would justify a jury in finding that "the reason for the [suppliers'] refusal to deal with [the plaintiff] was that they were in cahoots with the cartel to discourage competition in the [pavers'] market." Viazis's charge that his orthodontist competitors induced GAC to terminate its relationship with him to prevent Viazis's bracket from becoming a factor in competition in the market for orthodontic services has much in common with the charge in *JTC* and deserved the same kind of insightful assessment that the Seventh Circuit made

advertising. Although ruling that the court of appeals had given too little scrutiny to the FTC's evidence of anticompetitive effects, the majority gave no indication that it thought it was changing the law in any significant way. Indeed, the *CDA* case turned heavily on its particular facts, which the majority found so unpersuasive as to require remand to the court of appeals for another, less "quick" look.[19] The key principle established in *CDA* is that, while the antitrust Rule of Reason may sometimes be satisfied by a truncated analysis,[20] "what is required is an enquiry meet for the case." *Id.* at 781.

After the decision in *CDA*, it has been difficult for litigants and lower courts to know, in cases involving alleged restraints by professional organizations, just how extensive and convincing a plaintiff's proof of anticompetitive effects must be to satisfy a reviewing court that trade was unlawfully restrained. While some plaintiffs and trial courts may opt for more extensive discovery, fact-finding, and analysis than are necessary in fact, other courts, like the court of appeals in this case, may find it easy, after *CDA*, to reject plaintiffs' claims on the ground that their showings are inadequate. By reviewing the decision in this case, this Court could provide new and needed assistance to the lower courts on the standard

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[19] On remand, the district court easily dismissed the FTC's case, *California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000), no longer professing any interest in the fact, which it had previously found decisive, that "the record provides no evidence that the [CDA's advertising] rule has in fact led to increased disclosure and transparency of dental pricing." *California Dental Ass'n v. FTC*, 128 F.3d 720, 728 (9th Cir. 1997). The Court of Appeals in this case was prompted by this example, to follow suit.

[20] The majority's favorable citation of *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978), and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), indicated the Court's continuing appreciation of the benefits of truncated analysis, even in cases involving professional restraints.

of proof required in cases involving restraints on competition imposed by professional associations.[21] Presumably the *CDA* majority did not mean to make it nearly impossible to bring successful lawsuits against professional organizations engaged in trade-restraining self-regulatory activities.

In this case, the court of appeals hardly reviewed at all the record evidence on the AAO's sanctioning of Viazis for advertising his bracket as a way of promoting his orthodontic practice. Pausing only to explain away one particularly suspicious comment by an AAO official,[22] the court simply ruled that "Viazis was . . . unable to demonstrate that the ethics proceedings against him were a sham or that the standards applied were pretextual." It is unclear, however, both whether this is the correct legal test and why these matters and the significance of the official's statement were not questions for the jury. After all, the lower courts neither disputed that the bracket represented superior technology nor

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[21] Professional codes of ethics constitute naked restraints on the competitive freedom of individual practitioners. While literally anticompetitive, such codes have not been routinely declared unlawful because they may serve to promote competition, in the sense that they put it on a sounder basis and accordingly benefit consumers. Indeed, the CDA opinion is the most explicit one to date embracing the notion that professional self-regulation may directly restrain competition yet still be open to justification by demonstrating the existence of an identifiable market failure that the restraint in question may help to overcome. See also *Prof'l. Engineers,* 435 U.S. at 692 (language implying that a narrowly drawn, yet naked restriction on competitive bidding, applying only to "complicated . . . projects" and "inexperienced . . . customers," might be defensible). The Court has not been clear, however, on whether the restraint, to be valid, must be shown likely to yield actual results closer to those of an efficient market or whether, contrary to what had appeared to be the rule before *CDA*, *e.g.*, *Indiana Fed'n of Dentists*; *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); Professional Engineers, professionals citing the presence of market imperfections are free to regulate their competitive behavior without meaningful accountability under the antitrust laws.

[22] "It's not your work, Tony. Next time, play by the rules." (Rec. 395-98.)

effectively excluded the possibility, supported by the evidence, that what triggered the sanctions was the threat that the bracket posed to orthodontists' incomes. Although the court of appeals placed great weight on a case involving an industrial standards-setting program, *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F. 2d 284 (5th Cir. 1988), the orthodontists maintained no standards that the bracket violated. Instead, there was ample evidence from which a jury might have found the whole enforcement effort to be *ad hoc* (the bracket) and *ad hominem* (Viazis, the maverick competitor).

The court of appeals also could find no sufficient evidence of anticompetitive effects from the AAO actions against Viazis, despite acknowledging that orthodontists are denying their patients his (superior) orthodontic bracket. The court found "no evidence that the AAO has influence over its members' purchasing decisions" and no evidence "connecting [the orthodontists' nonuse of the bracket] to anything other than voluntary decisions by independent orthodontists." Yet individual orthodontists were rather obviously acting against self-interest, and thus inferrably in concert, in refusing to use the bracket despite its technological superiority and lower cost. The court of appeals also thought that Viazis's ability to market the bracket himself or to solicit GAC's competitors to do so proved that competition was unimpaired, despite the obvious likelihood and apparent fact that no one would touch the bracket once the AAO had issued its adverse findings. And, finally, the court again equated the AAO's action to a denial of product certification despite the *ad hoc* character of the proceeding and the product's superiority. Petitioner's evidence would justify a jury finding that the AAO proceeding was a "facilitating practice," enabling the orthodontics profession to orchestrate an effective boycott of Viazis's "better mousetrap."

The court of appeals appears to have read *CDA* as an invitation to give only cursory attention to any legal challenge to a professional association's actions with respect to professional advertising that are ostensibly taken to protect consumers against confusion. Yet important consumer interests may be served by professional advertising,[23] and professional organizations may have ulterior purposes in suppressing it.[24] Review by this Court of the lower courts' actions in this case could serve to correct misimpressions that some lower courts may have gotten from the Court's opinion in *CDA*.

III. A compartmentalized review standard will result in increased conflicts in the lower courts.

As demonstrated above, the lower courts have divided over the proper standard of review concerning circumstantial evidence that "tends to exclude" independent action in the analysis of antitrust conspiracies for the purpose of granting summary adjudication. The decision under discussion, which employs this improper compartmentalization approach, can only exacerbate the significant conflicts which already exist between the circuits as to treatment of these cases.

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[23] See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (overturning statutory prohibition against advertising prices of prescription drugs and recognizing "consumer's interest in the free flow of commercial information").

[24] *See, e.g., American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980) (upholding FTC action condemning overbroad private restrictions on advertising by physicians).

IV. A compartmentalized review standard threatens the enforcement of the antitrust laws and the protections afforded a free market economy.

The purpose of the Sherman Act, as described by the Supreme Court in *Northern Pacific Railway v. United States,* 356 U.S. 1 (1958), is "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Id.* at 4. The ruling at bar challenges this economic policy by making it unduly difficult for private litigants to avoid summary adjudication in antitrust conspiracy cases.

V. This is a case of national importance.

This case involves the unlawful boycott and exclusion of a new, innovative medical device, one potentially fostering a dramatic reduction in orthodontic treatment times (up to a year), resulting in massive harm to consumers (in excess of $3.2 billion), caused by a classic group boycott. This is clearly a matter of national import, not only for the sake of antitrust jurisprudence, but for the benefit of health care consumers and competition as well.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

PROF. CLARK HAVIGHURST
Of Counsel
DUKE UNIVERSITY
BOX 90360
SCIENCE DR. & TOWERVIEW RD.
DURHAM, NC 27708-0360
(919) 613-7061

BRADEN W. SPARKS
Counsel of record
8117 PRESTON ROAD
SUITE 800
DALLAS, TEXAS 75225
(214) 750-3372

Counsel for Petitioners

Dated: March 11, 2003

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

Anthony D. VIAZIS, et al., Plaintiffs,
Anthony D. Viazis, Plaintiff-Appellant,
v.
AMERICAN ASSOCIATION OF ORTHODONTISTS, et al., Defendants,
American Association of Orthodontists, Southwestern Society of Orthodontists,
GAC International, Inc., and Leo A. Dohn, Defendants-Appellees.

No. 01-41298.

Dec. 11, 2002.

Orthodontist who invented and patented triangular orthodontic brackets brought action against orthodontist associations, manufacturer of the device and its chief executive officer (CEO), alleging that defendants had conspired to exclude his brackets from the market, in violation of Sherman Act. The United States District Court for the Eastern District of Texas, 182 F.Supp.2d 552, Paul N. Brown, J., granted defendants judgment as a matter of law. Orthodontist appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) there was insufficient evidence of concerted action; (2) there was no showing of competitive harm; and (3) evidentiary rulings were correct.

Affirmed.

West Headnotes

[1] Federal Courts 776
170Bk776 Most Cited Cases

Court of Appeals reviews judgment as a matter of law *de novo*.

[2] Federal Civil Procedure 2152
170Ak2152 Most Cited Cases

[2] Federal Civil Procedure 2608.1
170Ak2608.1 Most Cited Cases

To defeat motion for judgment as a matter of law, nonmovant must present substantial evidence opposed to motion; in other words, nonmovant must present evidence that is of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions.

[3] Monopolies 12(1.8)
265k12(1.8) Most Cited Cases

Restraint of trade provision of the Sherman Act does not proscribe independent conduct; so, to establish violation, plaintiff must demonstrate concerted action. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[4] Federal Civil Procedure 2127
170Ak2127 Most Cited Cases

[4] Federal Civil Procedure 2609
170Ak2609 Most Cited Cases

In ruling on motion for judgment as a matter of law, court must consider all evidence offered by either party in light and

with all reasonable inferences in favor of party opposed to motion.

[5] Monopolies 28(7.5)
265k28(7.5) Most Cited Cases

Antitrust plaintiff who is unable to present direct evidence of conspiracy must introduce circumstantial evidence that tends to exclude possibility of independent action. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[6] Monopolies 28(7.5)
265k28(7.5) Most Cited Cases

Direct evidence of antitrust conspiracy is that which explicitly refers to understanding between alleged conspirators. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[7] Monopolies 28(7.5)
265k28(7.5) Most Cited Cases

There was no direct evidence to support orthodontist's claim that manufacturer of orthodontic devices and orthodontist association conspired to exclude his triangular orthodontic brackets from the market, in violation of Sherman Act; letter written by chief executive officer (CEO) of manufacturer contained no explicit reference to agreement between manufacturer and orthodontic association. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[8] Federal Civil Procedure 2148.1
170Ak2148.1 Most Cited Cases

[8] Federal Civil Procedure 2609
170Ak2609 Most Cited Cases

In ruling on motion for judgment as a matter of law, district court should refrain from making credibility determinations.

[9] Monopolies 28(7.5)
265k28(7.5) Most Cited Cases

Although letter written by chief executive officer (CEO) of manufacturer of orthodontic devices contained evidence of dealers' complaints, complaints were insufficient evidence of concerted action to support orthodontist's claim that manufacturer and orthodontist association conspired to exclude his triangular orthodontic brackets from the market, in violation of Sherman Act. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[10] Monopolies 28(7.5)
265k28(7.5) Most Cited Cases

There was no evidence that orthodontist association threatened boycott of orthodontist's triangular orthodontic bracket or that manufacturer's decision to cease marketing the bracket was inconsistent with its independent self- interest, as required to support inference of antitrust conspiracy in absence of direct evidence; there was no evidence that any dealer complaints were initiated by individuals having either actual or apparent authority to speak for association. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[11] Monopolies 28(7.5)
265k28(7.5) Most Cited Cases

In absence of evidence of formal decisionmaking, antitrust plaintiff must prove defendant association's conduct by demonstrating that action was taken by individuals having apparent authority to act for association. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[12] Monopolies 12(11)
265k12(11) Most Cited Cases

Orthodontists Association's suspension of orthodontist for violating prohibition of false and misleading advertising was not action pursuant to antitrust conspiracy, absent evidence that members of association were conspiring among themselves. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[13] Monopolies 12(1.10)
265k12(1.10) Most Cited Cases

Under per se rule, competitive harm from restraint of trade is presumed, and further analysis is unnecessary; if, by contrast, restraint is judged according to rule of reason, its net potential for competitive harm must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[14] Monopolies 12(1.10)
265k12(1.10) Most Cited Cases

Advertising restrictions promulgated by orthodontists association were not subject to per se analysis to determine whether restrictions amounted to unreasonable restraint of trade, in violation of Sherman Act, when applied to orthodontist. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[15] Monopolies 12(11)
265k12(11) Most Cited Cases

Orthodontists association's advertising restrictions did not have anticompetitive effect, as required to support

orthodontist's claim that his suspension was result of unreasonable restraint of trade. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[16] Federal Courts 762
170Bk762 Most Cited Cases

Court of Appeals may not disturb district court's exclusion of evidence if that ruling can be upheld on other grounds, regardless of whether court relied on those grounds.

[17] Evidence 508
157k508 Most Cited Cases

Expert testimony to effect that "consumers would have been harmed by the suppression" of triangular orthodontic brackets designed by orthodontist was irrelevant to orthodontist's antitrust claim which concerned market for orthodontic braces; testimony concerned alleged harm to orthodontic services market. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

[18] Evidence 318(1)
157k318(1) Most Cited Cases

Note written by chief executive officer (CEO) of manufacturer of orthodontic devices, recognizing possibility that orthodontist could file § 1 Sherman Act claim against manufacturer, was hearsay. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[19] Evidence 253(1)
157k253(1) Most Cited Cases

[19] Evidence 260
157k260 Most Cited Cases

Under coconspirator exception, hearsay evidence is

admissible only if proponent proves by preponderance of evidence that (1) conspiracy existed; (2) statement was made in furtherance of that conspiracy; and (3) coconspirator and party opposing admission were members of conspiracy.

[20] Witnesses 198(2)
410k198(2) Most Cited Cases

District court did not abuse its discretion in excluding testimony regarding note written by chief executive officer (CEO) of manufacturer of orthodontic devices recognizing possibility that orthodontist could file § 1 Sherman Act claim against manufacturer, on ground that passage was based on communications between CEO and his attorney, and was privileged attorney-client material. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[21] Federal Courts 896.1
170Bk896.1 Most Cited Cases

[21] Federal Courts 901.1
170Bk901.1 Most Cited Cases

Court of Appeals will not reverse erroneous evidentiary rulings unless aggrieved party can demonstrate substantial prejudice.

[22] Federal Courts 901.1
170Bk901.1 Most Cited Cases

Exclusion of expert testimony to effect that "consumers would have been harmed by the suppression" of triangular orthodontic brackets designed by orthodontist, and exclusion of note written by chief executive officer (CEO) of manufacturer of the brackets, recognizing possibility that orthodontist could file § 1 Sherman Act claim against manufacturer, did not result in substantial prejudice to

orthodontist in his suit alleging conspiracy to exclude his brackets from the market, in violation of Sherman Act. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

***760** Braden Wheeler Sparks (argued), Dallas, TX, Clark C. Havighurst (argued), Duke University, Durham, NC, for Plaintiff-Appellant.

David Paul Blanke (argued), Vinson & Elkins, Austin, TX, Brian Edward Robison, Vinson & Elkins, Dallas, TX, for American Ass'n of Orthodontists and Southwestern Society of Orthodontists.

Margaret M. Zwisler (argued), Howrey, Simon, Arnold & White, Washington, DC, for GAC Intern. Inc. and Dohn.

Appeal from the United States District Court for the Eastern District of Texas.

Before KING, Chief Judge, and SMITH and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Anthony Viazis appeals a judgment as a matter of law ("j.m.l.") in favor of the American Association of Orthodontists ("AAO"), the Southwestern Society of Orthodontists ("***761** SWSO"), GAC International, Inc. ("GAC"), and Leo A. Dohn. Finding no reversible error, we affirm.

I.

Viazis, an orthodontist practicing in the Dallas area, designed

and patented a triangular orthodontic bracket in 1991. [FN1] He contends that his bracket is more effective than other designs in that it decreases the amount of time braces must be worn. In 1992, Viazis entered into a contract with GAC, a manufacturer of orthodontic devices, to market and distribute his bracket.

FN1. Brackets are components of braces that are fixed onto the teeth with an adhesive. Wires are then passed through the brackets, and forces are applied to straighten the teeth.

In April 1996, Viazis sent an advertising mailer to the parents of school age children in the Plano, Texas, area near Dallas, claiming that braces made using the Viazis bracket were faster, less expensive, and potentially safer than other products. In May of that year, Viazis held a seminar promoting his brackets directly to these parents. A member of the Greater Dallas Association of Orthodontists ("GDAO") and the AAO forwarded a complaint regarding Viazis's advertisements to the AAO, indicating that Viazis's conduct might violate provisions of that organization's Code of Professional Responsibility.

Viazis alleged that the resulting controversy surrounding his advertisements resulted in the termination of the marketing aspect of his agreement with GAC. There was an adverse impact on the relationship between Viazis and GAC, and their arrangement was restructured in mid-1997. GAC continued to manufacture the Viazis bracket but ceased all marketing activities.

In December 1997, the AAO advised Viazis that he could be subject to disciplinary action as a result of the claims of faster, safer, and more effective treatment made in his

advertisements. In December 1999, after a hearing and appeal, the AAO suspended Viazis's membership in the organization.

Meanwhile, in August 1998, Viazis filed this action against the AAO, the SWSO, the GDAO, and various individuals who are no longer defendants. Viazis subsequently added Dohn and GAC as defendants. By the time of trial, Viazis's only remaining claim was that the AAO, SWSO, GAC, and Dohn had conspired to exclude his brackets from the market for orthodontic devices in violation of § 1 of the Sherman Act. At the conclusion of Viazis's case-in-chief at trial, the court granted defendants' motion for j.m.l.

II.

[1][2] We review a j.m.l. *de novo*. *Casarez v. Burlington N./ Santa Fe Co.*, 193 F.3d 334, 336 (5th Cir.1999). To defeat a motion for j.m.l., the nonmovant must present "substantial evidence opposed to the motion [ ]." [FN2] In other words, the nonmovant must present evidence that is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id.*

FN2. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc), *overruled in part on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997) (en banc).

[3][4][5] Section 1 of the Sherman Act does not proscribe independent conduct. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). So, to establish a § 1 violation, a plaintiff must demonstrate concerted action. *Id.* Further, although in ruling

on a motion for j.m.l. the court must consider all the evidence offered by either party "in the light and with all reasonable inferences in favor of" the party opposed ***762** to the motion, *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 481 (5th Cir.2001) (internal quotation marks omitted), in this case the range of permissible inferences is limited by particular principles of antitrust law, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Accordingly, evidence of conduct that is "as consistent with permissible competition as with illegal conspiracy" cannot support an inference of conspiracy. *Id.* In essence, an antitrust plaintiff who is unable to present direct evidence of a conspiracy must introduce circumstantial evidence that "tends to exclude the possibility of independent action." *Monsanto*, 465 U.S. at 768, 104 S.Ct. 1464.

Viazis contends that he introduced sufficient evidence of concerted action to avoid j.m.l. He alleges that GAC terminated the marketing agreement in response to threats made by AAO and its regional affiliates. He also contends that the decision of an AAO disciplinary committee to suspend him for one year was the result of unlawful concerted action. Viazis failed to introduce sufficient evidence to prove either allegation.

A.

[6][7][8] Direct evidence of a conspiracy is that which "explicitly refer[s] to an understanding" between the alleged conspirators. *See Southway Theatres, Inc. v. Ga. Theatre Co.*, 672 F.2d 485, 493 n. 8 (5th Cir.1982). The letter written by Leo Dohn, then-CEO of GAC, which constitutes Viazis's primary evidence bearing on the existence of a conspiracy between the AAO and GAC, contains no explicit reference to an agreement between GAC and any party. Each of the statements from the letter offered by Viazis as evidence of a conspiracy depends on additional inferences. [FN3]

Therefore, the letter is, at most, circumstantial evidence of a conspiracy. [FN4]

FN3. Viazis asserts that Dohn's statements to the effect that GAC might experience national repercussions are "inconsistent with localized complaints," and he claims that Dohn's prediction that Viazis would suffer adverse professional consequences as a result of his seminar are "consistent with ongoing communications." Neither these statements nor any other of the passages cited by Viazis contain explicit reference to an agreement between GAC and any other party.

FN4. Viazis contends that he introduced evidence of a conspiracy through testimony that the district court improperly disregarded. The testimony at issue related to whether GAC had a policy against advertising directly to consumers before the events at issue. Dohn testified that GAC had a policy against advertising directly to the public, although Barry Mervine, GAC's representative in Dallas, testified that he was unaware of any such policy. In addition, Viazis testified that GAC had foreknowledge of, and input into, a mailer through which he advertised to the public but failed to object to its contents.
Although, in ruling on a motion for j.m.l., a district court should refrain from making credibility determinations, *see* *Conkling v. Turner*, 18 F.3d 1285, 1300 (5th Cir.1994), the court did not necessarily do so here. Mervine's testimony does not establish that GAC advertised directly to consumers, nor even that GAC lacked a policy prohibiting such advertising. All Mervine's testimony establishes is that if such a policy existed or such advertisement took place, he was

unaware of it. His testimony, therefore, does not directly contradict Dohn's. Viazis's testimony has a greater tendency to undercut the existence of a longstanding policy against direct advertisement but does not contradict GAC's contention that it had not engaged in direct advertisement in the preceding decade.

In any event, even if the court improperly evaluated the credibility of these two witnesses in arriving at its conclusions, the legal result would be the same. Although proof of a preexisting policy tends to support an inference of independent conduct, *see* Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., 988 F.2d 587, 594 (5th Cir.1993); Culberson, Inc. v. Interstate Elec. Co., 821 F.2d 1092, 1094 (5th Cir.1987), the absence of such a policy does not necessarily support an inference of conspiracy. As discussed in part I.B.2 *infra*, GAC was entitled to act in response to customer complaints irrespective of whether it had a preexisting policy.

***763** [9] As discussed above, in the absence of direct evidence of a conspiracy, an antitrust plaintiff must present evidence tending to exclude the possibility of independent conduct. Monsanto, 465 U.S. at 768, 104 S.Ct. 1464. To do so, Viazis was required to demonstrate that GAC and AAO "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* Although the Dohn Letter contains evidence of complaints received by GAC from accounts in the Dallas area, such complaints are insufficient evidence of concerted action, because "[d]ealer-initiated contact fails to establish that a manufacturer has imposed restrictions collusively, not based on its independent business judgment." [FN5] In Culberson, this court specifically held that a manufacturer's action in the face of customer complaints is not a sufficient basis for a finding of

conspiracy. [FN6]

FN5. *Culberson*, 821 F.2d at 1094; *see also* *Matrix Essentials*, 988 F.2d 587.

FN6. *See* *Culberson*, 821 F.2d at 1093. Viazis's attempts to distinguish the *Monsanto* line of cases are unpersuasive. He accurately notes that the reasoning in *Monsanto* and its progeny reflects some concern that allowing dealer complaints to serve as evidence of conspiracy would deter legitimate business strategies, such as the adoption of marketing strategies using nonprice restrictions. Viazis contends that such concerns are not implicated here, because "conspiracies aimed at stamping out promising new technology should not be made unduly difficult to prove."

Even if manufacturers' ability to impose legitimate nonprice restrictions were the principal focus of *Monsanto*, this conclusional statement fails to offer any ground for distinguishing the present case. This case implicates GAC's ability to enforce its particular marketing strategy, namely, that of marketing to health professionals rather than the public, and therefore is not distinguishable from *Monsanto* on the ground argued by Viazis.

Further, Viazis ignores the fact that the *Monsanto* Court dealt with the "*two* important distinctions that are at the center of [any] distributor- termination case." *Monsanto*, 465 U.S. at 761, 104 S.Ct. 1464 (emphasis added). The distinction between price and nonprice restrictions was the second of these; the first was "the basic distinction between concerted and independent action." *Id.* The Court dealt with this distinction by reaffirming the principle that "[a]

manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Id.* (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919)). GAC's ability to deal or refuse to deal with Viazis is implicated by these proceedings.

[10] Viazis argues, however, that GAC was faced with more than mere dealer complaints. Instead, he maintains, the AAO itself threatened a nationwide boycott to coerce GAC to end its marketing efforts on behalf of Viazis, and GAC acceded to AAO's demands. Such an inference of conspiracy is appropriate only if Viazis presented evidence tending to exclude the possibility of independent conduct on the part of AAO and GAC. To meet this standard, Viazis needed to show both that the AAO threatened a boycott and that GAC's decision to cease marketing the Viazis bracket was inconsistent with its independent self- interest. He failed to do so.

[11] A corporate entity such as the AAO can act only through its agents. Consequently, in the absence of evidence of formal decisionmaking, an antitrust plaintiff must prove an association's conduct by demonstrating that the action was taken by individuals having apparent authority to act for the association. *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 556-67, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982).

The Dohn Letter contains no indication that any of the referenced complaints was initiated by individuals having either actual or apparent authority to speak for the ***764** AAO. Viazis introduced no evidence of a membership vote or other formal decisionmaking process through which the AAO acted to threaten GAC or authorized its agents to do so. Nor did he produce evidence that the unnamed Dallas accounts referred

to in the Dohn Letter had apparent authority to speak for the AAO on such a matter. Viazis has introduced no evidence that the AAO itself, as opposed to some of its individual members, took action with respect to GAC.

Moreover, evidence that a manufacturer took certain actions does not tend to exclude the possibility of independent conduct if the actions were in the manufacturer's independent self-interest. [FN7] In other words, even if Viazis proved that the AAO or its regional affiliates threatened GAC, he must also show that GAC decided to end its relationship in response to those threats. If GAC ignored the threats but ended the relationship with Viazis based on an independent evaluation of its best interests, GAC acted independently, and there was no conspiracy. *See Matrix Essentials*, 988 F.2d at 594; *Lovett*, 998 F.2d at 579-81. Viazis failed to demonstrate that GAC's decision to alter its relationship with Viazis was contrary to its own interests.

FN7. *See Matrix Essentials*, 988 F.2d at 594; *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 579-81 (8th Cir.1993).

Viazis introduced statements made by GAC regarding the enormous potential market for his bracket and argued that GAC could not have been acting in its own interests when it abandoned its marketing rights. This argument fails, because GAC could have determined that the potential benefits from its marketing agreement with Viazis would be outweighed by the loss of business that would result from its continued association with him. [FN8] Therefore, GAC's decision to alter its relationship with Viazis is not evidence tending to exclude the possibility of independent behavior.

FN8. *See* Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1030 (6th Cir.1991); *see also* Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 909 (4th Cir.1986) ("One [legitimate reason for terminating a relationship with a dealer] is to avoid losing the business of disgruntled dealers.").

B.

[12] Although there is no evidence that any authorized agent of the AAO threatened GAC, Viazis does point to one instance of official conduct by the AAO, namely, his suspension pursuant to the finding of an AAO ethics committee that he had violated the organization's prohibition of false and misleading advertising. Because there is no connection between this proceeding and GAC, it can constitute action pursuant to a conspiracy only if the members of AAO were conspiring among themselves. Viazis failed to present sufficient evidence of such a conspiracy.

Despite the fact that "[a] trade association by its nature involves collective action by competitors[,] ... [it] is not by its nature a 'walking conspiracy', its every denial of some benefit amounting to an unreasonable restraint of trade." *Consolidated Metal Products, Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir.1988). In *Consolidated Metal Products*, we rejected a claim of conspiracy based on a trade association's delay in licensing the plaintiff's product, noting that the plaintiff had failed to offer evidence that the proceedings were "merely a ploy to obscure a conspiracy against competing producers." *Id.* at 294. Viazis similarly was unable to demonstrate that the ethics proceedings against him were a sham or that the standards applied were pretextual, [FN9] so he failed ***765** to establish the existence of an unlawful conspiracy. *See id.* To the extent that he challenges the promulgation of the advertising restrictions by

the AAO, as opposed to their enforcement, his failure to demonstrate any competitive harm, as discussed below, is fatal to that claim.

> FN9. During the appeal of Viazis's suspension, Dr. Hershey, one of the panelists, told Viazis: "It's not your work Tony. Next time, play by the rules." This comment is certainly suspicious, but it is not direct evidence of conspiracy, because it does not explicitly reference any agreement. In addition, Hershey's statement is not inconsistent with the committee's finding that Viazis violated the AAO's prohibition of deceptive advertising. The committee could have found Viazis's bracket to be a good product, while still concluding that Viazis had used inappropriate methods to promote it. In any event, in light of the fact that GAC ended its marketing arrangement with Viazis over a year before his suspension, the exclusion of which Viazis complains had long since occurred.

III.

[13] Even if Viazis had presented sufficient evidence of concerted action, § 1 of the Sherman Act prohibits only those agreements that constitute unreasonable restraints of trade. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (citation omitted). The question whether a particular restraint is unreasonable frequently turns on whether it is examined under the rule of reason or falls within the category of practices that are judged to be unreasonable *per se*. If application of the *per se* rule is appropriate, competitive harm is presumed, and further analysis is unnecessary. If, by contrast, the restraint should be judged according to the rule of reason, its net potential for

competitive harm must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.

A.

[14] Viazis contends that the advertising restrictions in question should be reviewed according to the *per se* rule. Typically, it is the type of restraints that are "always or almost always" anticompetitive that are deemed to be unreasonable *per se*. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). The Supreme Court has been reluctant to apply the *per se* rule to standards promulgated by professional organizations, such as the advertising restriction at issue here. [FN10]

> FN10. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) ("[W]e have been slow to condemn rules adopted by professional associations as unreasonable *per se*.").

In fact, the Court recently concluded that advertising restrictions imposed by a professional association are not subject to a *per se* analysis. In *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999), a case dealing with the legality of advertising restrictions that are remarkably similar to those at issue here, the Court necessarily rejected the application of the *per se* rule by holding that even the truncated rule of reason, or "quick look," treatment applied by the Ninth Circuit was insufficient given the potential procompetitive effects of such restrictions in a market for professional services. *Id.* at 763-81, 119 S.Ct. 1604. The *per se* rule likewise is inapplicable to the restrictions at issue in this case.

B.

Although *California Dental* rejected the application of *per se* or even quick-look analysis to advertising restrictions implemented by a professional association, it did not hold that a full market analysis is required in such cases. *Id.* at 779, 119 S.Ct. 1604. Instead, the Court held that "[w]hat is required is an enquiry meet for the case." *Id.* at 780, 119 S.Ct. 1604. ***766** Under this approach, an analysis is sufficient if it openly addresses the "circumstances, details, and logic of a restraint" in reaching its conclusion. *Id.* at 781, 119 S.Ct. 1604.

In *California Dental,* the Court recognized that a restriction on advertising related to quality has several potential procompetitive justifications. [FN11] On remand, the Ninth Circuit determined that the FTC had failed to prove that the advertising restrictions at issue were a net harm to competition. *Cal. Dental Ass'n v. FTC,* 224 F.3d 942, 957 (9th Cir.2000). The court noted that the Federal Trade Commission had failed to prove actual harm by presenting relevant data from the precise market at issue. *Id.*

> FN11. *Cal. Dental,* 526 U.S. at 778, 119 S.Ct. 1604 (noting that a restriction on quality-related advertisement for professional services may be justified by the possibility "that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market").

[15] Viazis similarly has failed to present data demonstrating the anticompetitive effects of the advertising restrictions of which he complains. In the absence of such data, he has not carried his burden to demonstrate that the restrictions have a net anticompetitive effect. *See id.*

Viazis claims that competitive harm is demonstrated by the steep decline in sales of his brackets to orthodontists. There is no evidence, however, that the AAO has influence over its members' purchasing decisions or that it coerced them into rejecting Viazis's brackets. In *Consolidated Metal Products*, 846 F.2d at 296, we held that where an association's product recommendations were nonbinding and the association did not coerce its members to abide by its recommendations, its refusal to sanction plaintiff's product did not show that plaintiff was excluded from the market. Nor can a plaintiff show competitive harm merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product." *Id.* at 297.

Though there is evidence demonstrating a drastic reduction in the number of orthodontists purchasing Viazis's brackets, there is none connecting that decrease to anything other than the voluntary decisions of independent orthodontists. Moreover, GAC has, at most, a 20% market share in orthodontic brackets. Therefore, GAC's refusal to market on behalf of Viazis could not significantly impede his ability to market the brackets, either independently or through GAC's competitors.

Indeed, Viazis has been successful in marketing his brackets to dentists and remains free to sell them to any orthodontist willing to purchase them. In the absence of proof that the AAO and its member orthodontists are engaging in a conspiracy, Viazis cannot prove harm to competition, because he can demonstrate nothing more than that his product is no longer selling well, at least not to orthodontists.

IV.

Viazis challenges two evidentiary rulings. First, he contends

that the court erred in refusing to admit expert testimony to the effect that "consumers would have been harmed by the suppression" of the brackets. The testimony was excluded based on the determination that the testimony was not contained in the expert's report, as required by Local Rule 26(d)(1). In challenging this ruling, Viazis cites a passage in the expert's report that contains the excluded testimony almost *verbatim*. It therefore appears that the district court may have erred in determining that the testimony should be excluded under the local rule.

***767** [16][17] Nonetheless, we "may not disturb the district court's exclusion of the evidence ... if that ruling can be upheld on other grounds, regardless of whether the court relied on those grounds." *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1207 (5th Cir.1986). The excluded testimony concerned alleged harm to the orthodontic services market, rather than the relevant market for purposes of Viazis's claim, which is the market for orthodontic braces. The testimony therefore was arguably irrelevant, as noted by the district court, and could have been excluded on that ground as well. *See* Fed.R.Evid. 401.

[18] Viazis also asserts that the district court erred in refusing to allow cross-examination concerning portions of a note written by Dohn that recognized the possibility that Viazis could file a § 1 claim against GAC. The excluded portion was hearsay, but Viazis argues that it should have been admitted under the exception for statements made by coconspirators.

[19] Under the coconspirator exception, hearsay evidence is admissible only if the proponent proves by a preponderance of the evidence that (1) a conspiracy existed; (2) the statement was made in furtherance of that conspiracy; and (3) the coconspirator and the party opposing admission were members of the conspiracy. *Burton v. United States*, 237 F.3d

490, 503 (5th Cir.2000). Because no conspiracy was established here, the coconspirator exception cannot apply, and the evidence was not admissible against AAO and the other association defendants.

[20] Additionally, GAC contends that the passage in question was based on communications between Dohn and his attorney, and that it is therefore privileged attorney-client material and inadmissible. The district court did not abuse its discretion in excluding testimony regarding the note on either of these grounds.

[21][22] In any event, we will not reverse erroneous evidentiary rulings unless the aggrieved party can demonstrate "substantial prejudice." *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 602 (5th Cir.2000). Viazis failed to demonstrate that the exclusion of either of these pieces of evidence resulted in substantial prejudice.

AFFIRMED.

314 F.3d 758, 2002-2 Trade Cases P 73,907

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ANTHONY D. VIAZIS, et al.	§	
Plaintiffs,	§	4:98-CV-245
	§	
VS.	§	
	§	
AMERICAN ASSOCIATION OF	§	
ORTHODONTISTS, et al.	§	
Defendants.	§	

FINAL JUDGMENT

This action came on for trial before the Court and a jury on November 6, 2000, the undersigned presiding. At the completion of the Plaintiffs' case and after Plaintiffs had rested, Defendants presented their Motion for Judgment as a Matter of Law pursuant to Rule 50(a)(1), Federal Rules of Civil Procedure. The Court orally granted Defendants' motion and has now entered a Memorandum Opinion and Order of even date herewith, setting forth in detail its reasons for granting Defendants' motion.

It is therefore, ORDERED and ADJUDGED that Plaintiffs, Anthony D. Viazis, Anthony D. Viazis, D.D.S., M.S., P.C., Oralect Licensing, Ltd., OSI: Orthosystems, Inc., Trigon Distribution, Ltd., and Orthobraces, Inc., take nothing from the Defendants, American Association of Orthodontists, Southwestern Society of Orthodontists, GAC International, Inc., and Leon Dohn, and that Plaintiffs' claims be DISMISSED WITH PREJUDICE.

It is further ORDERED and ADJUDGED that Defendants recover from Plaintiffs all of their costs of Court, for which execution shall issue, and that all relief requested by any party not previously granted is denied.

SIGNED this 24th day of September, 2001.

By: /s/
PAUL BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ANTHONY D. VIAZIS, et al.	§	
Plaintiffs,	§	4:98-CV-245
	§	
VS.	§	
	§	
AMERICAN ASSOCIATION OF	§	
ORTHODONTISTS, et al.	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Defendants in this case moved at trial for Judgment as a Matter of Law as to Plaintiff Anthony D. Viazis' ("Viazis") sole remaining claim in this case, Viazis responded, and the Court ruled orally in Defendants' favor on November 13, 2000, and stated that this more detailed written order would be entered at a later date.

I. INTRODUCTION.

The pleadings and evidence at trial establish the following. In 1991, Viazis, a practicing orthodontist in the State of Texas, invented and patented triangular orthodontic brackets. Viazis claims, that when used in conjunction with super-elastic wires, the brackets can straighten teeth more quickly and less expensively than conventional braces. In 1992, GAC International, Inc., ("GAC"), an international marketer and distributor of orthodontic products, contracted with Viazis to market and distribute the Viazis brackets under an exclusive license. Viazis also contracted to make personal

appearances and educate other practitioners about the brackets.

In April of 1996, Viazis sent out an advertising mailer to parents in the Plano, Texas area and announced a free seminar at a local school. The advertisement claimed that the brackets were "faster, less expensive and potentially safer." (Pls.' Resp. Opp. AAO SWSO's Mot. Summ. J. at 6) Viazis held the seminar trumpeting his brackets in early May.

A member of both the Greater Dallas Association of Orthodontists (the "GDAO") and the American Association of Orthodontists ("AAO"), a current defendant in this action, forwarded the advertising materials to the AAO, informing the association of a potential breach of the AAO's Code of Professional Responsibility in that the advertising might constitute deceptive or misleading communications or public statements. The code of the AAO prohibits unjustifiable suggestions that one dental device is superior to others. In addition, the rule prevents dental professionals from creating unjustified expectations about results of treatment.

Viazis alleged that his relationship with GAC, which was, as indicated *supra*, his initial manufacturer, marketer, and distributor, was destroyed by reaction to his advertising efforts. Viazis alleged that a number of local practitioners who attended Viazis' seminar threatened never to purchase from GAC again (Joint Final Pre-Trial Order at 5.) In fact, Viazis presented a May 8, 1996 letter Leo Dohn ("Dohn"), chairman of GAC at the relevant time and also a Defendant here, wrote to Viazis where Dohn expressly stated threats had been made against GAC. It is indisputable that after early May 1996, the commercial relationship between Viazis and GAC deteriorated. Viazis and GAC's disagreements were ostensibly addressed by way of a compromise agreement entered into in mid-1997. Viazis alleged at trial, however, that he did not voluntarily enter such mid-1997 agreement.

Actually, the revised arrangements between GAC and Viazis did not resolve the controversies surrounding his braces. In December of 1997, the AAO advised Viazis that disciplinary action was warranted against him for the comments that he made in his advertisements regarding less treatment time, more patient comfort, no clinical root resorption, and faster, easier braces. Then, on August 28, 1998, Viazis and other Plaintiffs commenced the instant action against the AAO, the Southwestern Society of Orthodontists ("SWSO"), the Greater Dallas Association of Orthodontists ("GDAO"), and various individuals no longer Defendants including Dr. Mark Geller ("Geller"), Dr. Douglas Crosby ("Crosby"), Dr. Dean Jensen ("Jensen"), Dr. Richard McFarland ("McFarland"), and Dr. T.L. Daugherty ("Daughtery") (collectively, the "Former Individual Defendants"), alleging violations of antitrust law as well as state and common law. Viazis subsequently added as Defendants Dohn and GAC. By trial, however, Viazis had only one claim remaining against the following Defendants: the AAO, the SWSO, GAC and Dohn. (Joint Final Pre-Trial Order at 2-3). Specifically, Viazis claims that the remaining Defendants' conduct violated Section 1 of the Sherman Act.

Through the course of the case, Viazis maintained various allegations crucial to his remaining claim. First, he has alleged: "[The AAO]...was...attempting to control the entry of all new orthodontic products in the industry [when it disciplined Viazis]." (Joint Final Pre-Trial Order at 3.) Second, Viazis asserted the Defendants undertook to enforce an unwritten rule prohibiting direct advertising to the public. (*See id.*) Actually, due to the requirements of Section 1 explained *infra*, it is important to concretely fix Viazis' view of the relationship between Defendants and other orthodontists. In this regard, Viazis' counsel expressly stated early on at trial that Viazis alleged *one conspiracy* among the

four remaining Defendants. (Trial Transcript at 88.) He essentially stated the same thing later in the trial:

> The Court: Mr. Sparks, I want to be sure that I understand what your claim is in this case. Your contentions in the pretrial order are not artfully drawn. They are difficult to decipher.
>
> I have interpreted them to mean that you are claiming one conspiracy composed of the AAO, the [SWSO], [Dohn], GAC, and other orthodontists, correct.
>
> [Viazis' Counsel]: Correct.
>
> The Court: Now, one conspiracy, correct?
>
> [Viazis: Counsel]: Correct.

(Trial Transcript at 1059.) Finally, after resting his case, Viazis' counsel stated: "The purpose of the conspiracy was…to punish Viazis [for doing comparative advertising] by restraining his bracket from the marketplace." (Trial Transcript at 1168.)

Before and at the conclusion of Viazis' case, the Defendants asserted motions for judgment as a matter of law. In a joint motion asserted before Viazis rested, the Defendants moved on the basis that Viazis had failed to show one of the requisite Section 1 elements. Additionally, at the close of Viazis' case, the Defendants filed separate motions for judgment as a matter of law claiming that Viazis had failed to submit sufficient evidence to make out any of the three required Section 1 elements.

II. STANDARD.

Under Fed.R.Civ.Proc. 50(a)(1), "[I]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient basis for a reasonable jury to find for that party on an issue," then a court may "determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Further, "motions for judgment as a matter of law may be made at any time before submission of the case to the jury," and are to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed.R.Civ.Proc. 50(a)(2)[1]

In order to create a jury question on an issue, "there must be a dispute in the substantial evidence, that is, evidence which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Chancy v. New Orleans Pub. Facility Management,* 179 F.3d 164, 167 (5th Cir. 1999). "[A] mere scintilla of evidence is insufficient to present a question for the jury" and even if the "evidence is more than a scintilla...some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield a directed verdict." *Id.* (citations omitted). In evaluating Defendants' motions for judgment as a matter of law, this Court must "view the...record in the light most favorable to [a plaintiff], drawing all factual inferences in favor of... [a

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[1] The court recites Fed.R.Civ.P. 50 as it read before December 1, 2000 when amendments to the Federal Rules of Civil Procedure took effect. The pre-December 2000 version of the rules govern this case.

plaintiff], and leaving credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts to the jury." *Conkling v. Turner*, 18 F.3d 1285 (5th Cir. 1994), *appealed after remand*, 138 F.3d 577 (1998) (citations omitted).

III. ANALYSIS.

Sherman Act Section 1 prescribes "[e]very contract, combination..., or conspiracy, in restraint of trade." It does not, however, prohibit every conceivable restraint of trade. Rather, it forbids those that result from concerted action. *Ginzburg v. Memorial Healthcare Sys., Inc.*, 993 F. Supp. 998, 1009 (S.D.Tex. 1977) (citations omitted). Additionally, such concerted restraints of trade must be judged unreasonable. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.,* 105 S.Ct. 2613, 2616 (1985) (citations omitted). Finally, even if a plaintiff proves an unreasonable concerted restraint of trade, to recover under the antitrust laws, he must show "cognizable injury attributable to the violations." *Taylor Publishing Co. v. Jostens, Inc.,* 36 F.Supp. 2d 360, 372 (E.D. Tex. 1999) (citations omitted).

A. Concerted Action

Antitrust jurisprudence provides various doctrines relevant to Viazis' charges of conspiracy here. As an important statement of relevant general principle, the Court notes that " 'antitrust limits the range of permissible inferences from ambiguous evidence.' " *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Centers, Inc.,* 200 F.3d 307, 312 (5th Cir. 2000) (citing *Matsushita Elec. Indus. v. Zenith Radio,* 106 S.Ct. 1348, 1356 (1986)). Indeed, " 'conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an

inference of antitrust conspiracy[.]' " *Id.* at 313 (citing *Matsushita Elec. Indus.*, 106 S.Ct. at 1356).

More specifically relevant here, while "[a] conspiracy may be shown by circumstantial evidence," the "evidence must tend to 'exclude the possibility' that the defendants acted independently." *Culberson, Inc. v. Interstate Elec. Co.*, 821 F.2d 1092, 1093 (5th Cir. 1987) (referencing *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1486 (D.C. Cir. 1984) and citing *Matsushita Elec. Indus.*, 106 S.Ct. at 1357). Inferences of concerted action from circumstantial evidence must be " ' reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [a plaintiff].' " *Id.* (citing *Matsushita Elec. Indust.*, 106 S.Ct. at 1357).

Further, the law has had special occasion to consider permissible inferences in the context of manufacturer relationships with customers or distributors such as the relationships at issue here. In doing so, it has concluded that " ' [t]o allow evidence of termination following or in response to complaints to serve as the sole basis for [finding a conspiracy] would tend to discourage legitimate dealer complaints and legitimate manufacturer action in the face of such complaints.' " *Id.* (citing *Business Elec. Corp. v. Sharp Elec. Corp.*, 780 F.2d 1212, 1217 (5th Cir.) and quoting *Monsanto v. Spray-Rite Serv. Corp.*, 104 S.CT. 1464, 1469 (1984)). Or, as the Eight Circuit has put it:

> [E]vidence that manufacturer took adverse action against a dealer following, or in response to,...complaints from other dealers is not enough to support an inference of conspiracy. Instead, the [plaintiff] must present additional evidence tending to

> exclude the possibility that the manufacturer took the adverse action independently.

Lovett v. Gen. Motors Corp., 998 F.2d 575, 578 (8th Cir. 1993) (citing *Monsanto,* 104 S.Ct. at 1470-71 and *Matsushita Elect. Indus. Corp.*, 106 S.Ct. at 1356).

With respect especially to GAC and Dohn, the evidence presented in this case by Viazis simply could not satisfy these standards. All one can reasonably say Viazis really did was to offer a letter Dohn sent Viazis where Dohn stated that several major Dallas- area accounts had threatened GAC that they would no longer purchase brackets or other products from GAC because they associated Viazis' marketing methods with GAC. (*See* Pl.'s Ex. 75.) Shortly thereafter, GAC and Viazis modified their relationship so that GAC no longer marketed Viazis' brackets but only manufactured them for him. The evidence shows that prior to Viazis' controversial mailer and seminar, GAC had a practice of not advertising orthodontic materials to the end-users of braces – the public – directly. Rather, it advertised to medical professional, who distributed the brackets to the end-users. GAC steadfastly adhered to this practice before, during, and after the Viazis mailer and seminar. In fact, GAC's evidence supports the notion that any "threats" or complaints of its distributors – orthodontists - only reinforced its view such advertising was inappropriate and bad business.

Viazis submitted various pieces of evidence and case law, which the Court found unpersuasive, to argue there was more to GAC's "dropping" him such that a jury should have addressed the concerted action issue. First, Viazis suggested he presented credible evidence that GAC dropped him as more than just a response to customer complaints, but under pressure from the AAO (and presumably the SWSO). (Trial

Transcript at 1165-66). Specifically, he argued various inconsistencies:

> Well, first of all, you just heard Barry Mervine [,GAC's regional sales manager,] deny that there was ever any indication that any orthodontists had ever threatened GAC. You have every orthodontist who has testified denying the he ever made any threat. In other words, the Defendants have put this evidence in the record that there is absolutely no evidence, if you want to believe the orthodontists, and if you believe everybody at GAC except Mr. Dohn. Even Mr. Dohn, its pure hearsay and its third-party hearsay. He heard it from Schultz [,President of GAC,] who heard it from Mervine, who says it didn't happen.

(Trial Transcript at 1166.) The Court's review of the evidence cited by Viazis showed Mr. Mervine denied or couldn't recall threats being made against GAC while Dohn sent a letter to Viazis claiming threats had been made. Also, it is true that Viazis presented evidence that Dohn heard about threats through Schultz and suggesting that Schultz heard about them through Mervine. None of this did anything more, however, than to create, in summary judgment parlance, a scintilla of evidence of some sort of collusion between GAC and someone else.

It did not create a scintilla of evidence that the SWSO or the AAO were the impetus behind any threats or that GAC acted in concert with either. In this regard, all Viazis showed was that one of the Individual Defendants was, at the relevant time, the president-elect of the SWSO, the regional affiliate of the national AAO. He claimed this orthodontist, Dr. Mark Geller, was one of those who threatened GAC, offered a letter Schultz mailed to Geller stating that GAC was not behind

Viazis' advertising techniques (McFarland and Daugherty received similar if not identical, letters), *see* Trial Transcript at 1091, 1120, and submitted that Geller, along with Crosby, Jensen, Dr. John Wise, and Dr. Stephanie Smith attended Viazis' Plano seminar, *see* Trial Transcript at 951-52, 1016. Even if this evidence had been sufficient for the jury to conclude Geller and some of the other names Viazis offered were the "major [GAC] accounts" that Dohn cited in his letter as threatening to take their business from GAC,[2] which the Court does not believe a reasonable jury could, it is not sufficient to conclude the AAO or SWSO drove the threats and that GAC responded to the AAO or SWSO.

This is so because "a principal will be liable for an antitrust violation [based on the actions of its agents when they] act [] with apparent authority...by conspiring with another person." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1009 (3rd Cir. 1994). Whether certain individuals did or did not complain they would remove their business could not have implicated the AAO or SWSO merely because those individuals were members of, or even, as in the case of Geller, an officer of such entities. An elementary and widely accepted principle does something to make third parties believe its agents have authority to act in a certain way. No reasonable reading of the evidence presented by Viazis can suggest GAC thought the complaints occurred under the auspices of AAO's or SWSO's apparent authority.

Not only did Viazis fail to show that GAC's alteration of its relation with him was coerced by the AAO or SWSO, he failed to sufficiently implicate concerted influence by anyone. Indeed, even if a jury could have found Geller and

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[2] In fact, as examples, both Geller and Crosby denied at trial that they were significant customers (major accounts) for GAC, and Viazis did not offer evidence to disprove their denials.

some of the other names Viazis tossed out where the "major [GAC] accounts" that Dohn cited and that threats occurred, it would be wholly consistent, as a matter of law, with GAC legitimately responding to the complaints of several of its customers. This conclusion is obvious from an application of the statements of law in the customer complaint cases cited *supra*, and the facts from some of those cases reinforce it. In fact, *Lovett* presents facts readily analogous to those here where the Eight Circuit granted judgment as a matter of law to the antitrust defendant – General Motors Corporation ("GM").

In the case, GM stood accused of, among other things, having violated Section 1 by reducing the flow of automobiles to one of its dealers in Minnesota, allegedly in concert with other complaining dealers. *Lovett*, 998 F.2d at 576-78. Underlying the dispute was GM's allocation of areas of primary responsibility ("APRs") to its dealers. *Id.* at 577. The aggrieved dealer engaged in a marketing program that sold cars to consumers at only $49 above the dealer's factory invoice. *Id.* The program apparently resulted in consumers from a different APR, including the "Twin Cities" region of the state flocking to the aggrieved dealer as a purchase, but not servicing, point for GM vehicles. *Id.* at 577-78. Predictably, GM dealers having APRs including the Twin Cities were not happy as "[d]ealer associations and individual dealers complained that [the plaintiff dealer's] program detracting business from the Twin Cities area and reducing their profits..." *Id.* at 577. "They asked GM to take strong action to eliminate [the plaintiff dealer's] program." *Id.*

The plaintiff dealer in *Lovett* presented what this Court believes to be significant and relatively unambiguous evidence that GM's ultimate reduction in vehicle flow to it was taken as a result of its dealers' complaints. First, GM

scrutinized the plaintiff's car sales record. *Id.* at 579. Second, GM division officials visited the plaintiff and expressed concern that they could not meet its orders for GM cars. *Id.* One such official "got angry and expressed opposition to [the plaintiff's marketing] program." *Id.* Another informed the owner of the plaintiff dealer (himself a plaintiff) that "Twin Cities Cadillac dealers were very upset and [that the dealer] should stop its program." *Id.* Third, GM division officials informed their superiors in written memoranda that the Twin Cities dealers were upset because their profits were being hurt. *Id.* Fourth, one official in the Twin Cities Buick Dealer Advertising Association informed a GM division officer, a Buick officer, that the official was resigning from the association in protest over Buick's reluctance to combat the plaintiff dealer's program. *Id.* Finally, the plaintiff submitted evidence that a Twin Cities dealer told a customer the customer would receive an automobile faster through the Twin Cities dealer because the Twin Cities dealers had "gotten together...[with] GM...to run [the plaintiff] out of business." *Id.* at 580. All of this occurred before Buick determined it "could not distribute cars [in response to the plaintiff dealer's program]." *Id.* at 579-80.

The plaintiff apparently even presented circumstantial evidence of GM collusion with dealers after the Buick decision to curtail the plaintiff dealer's program. For instance, another customer who complained to GM about delay in receiving an auto from the plaintiff reported being told by a GM employee: "[Y]ou know what is happening." *Id.* Despite this evidence on to of the other evidence cited *supra*, the Eight Circuit found the plaintiff's evidence was ambiguous and could not overcome competing inferences of legitimate behavior. *Id.* It is apparent to this Court then, that the evidence presented by Viazis to suggest GAC acted in concert with the AAO, SWSO or others is at a minimum no less ambiguous than that presented in *Lovett.*

One possible distinction between *Lovett* and this case, however, is that the Eight Circuit noted that GM had "steadfastly refused" to discuss the plaintiff dealer with complaining dealers. *Id.* Instead, the Eight Circuit felt GM took the complaints and engaged in internal deliberations about what to do. *Id.* Here, somewhat more direct evidence has been presented suggesting that GAC did discuss the complaints with some orthodontists. To begin, there are the letters GAC apparently mailed to orthodontists distancing itself from Viazis' mailer. It is not clear whether these letters were mailed before GAC was "threatened," if, in fact, threats were made. Another item is Dohn's admission that he copied Dr. Earl Cote, a former president of the AAO, on the letter reciting threats (along with admonishment of Viazis). Dohn claimed that Cote was a friend of GAC's who had mentioned to Dohn, after the AAO's 1996 convention following the Viazis seminar, that he thought "it was bad policy for GAC to continue its association with Dr. Viazis." (See Trial Transcript at 232-233.) As a final example, Viazis presented evidence that Geller, Jensen, Dr. Carlos Navarro, and perhaps others orthodontists were pulled to GAC's booth at the convention by GAC's Barry Mervine, and that GAC's Charles Schultz emphasized to them GAC's disassociation from Viazis. (*See, e.g.,* Trial Trans. at 947-50.) Viazis also tried with less success to suggest AAO officials were present at the booth. (*See* Trial Trans. at 228.)

None of this evidence convinced the Court that there should have been an outcome here different than the one that occurred in *Lovett*. There is simply nothing sinister about AAO officials and orthodontists having been near an orthodontic manufacturer's booth at an orthodontics convention. Also, there is only the slenderest inference upon inference to suggest the orthodontists Viazis submitted as either receiving GAC's disassociation letter or attending his

seminar were the complainers/threateners.[3] Nor is there any real evidence to show that the complainers colluded with each other. Even assuming Viazis' evidence sufficiently showed GAC did in fact discuss the complaints it received with orthodontists including, among others, some of the Former Individual Defendants, persons to whom Schultz mailed his disapproval letter or attendees of Viazis' seminar, however, the Court does not believe this to create concerted action here. First, *Culberson,* 821 F.2d at 1093 (footnote omitted) (emphasis added) suggests a manufacturer's talking to complainers about their complaints is not fatal:

> [N]umerous…authorized RCA distributors…complained to RCA that subdistribution and transshipment [,the practices supporting the plaintiff's business,] were hurting [their] sales performance. RCA *responded* by adopting a policy against subdistribution and so *notified its distributors by letter* in February 1982. [An RCA distributor]…then stopped supplying [the plaintiff]. [Then,]… RCA *sent a second letter to its distributors* reaffirming its policy against subdistribution. Upon its receipt, [another distributor] stopped supplying [the plaintiff]….

Second, GAC apparently had a practice of not advertising directly to orthodontic patients. Viazis testified that he submitted his mailer to an advertising professional suggested by GAC for review and that he only mailed the item after such review. He further suggested GAC wanted to use him as a test case. GAC denied these allegations. Crucially, for this Court's decision, however, Viazis did nothing to chip away at GAC's submission that it had not advertised directly to patients for over a decade due to

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[3] Again, Geller and Crosby denied being major GAC accounts.

problems that had arisen in the past when orthodontic manufacturers had so advertised. Specifically, orthodontists had apparently complained when products that were so advertised did not perform as promised or had other problems. The Fifth Circuit decision in *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc. of Lafayette,* 988 F.2d 587 (5th Cir. 1993) makes it clear this evidence of a preexisting policy or practice undergirding a manufacturer's decision to respond in a certain way to customer complaints is significant. *See also Culberson*, 821 F.2d at 1094.

In *Matrix Essentials, Inc.*, the policy issue appeared to be decisive. The Plaintiff sued a retailer for selling products packaged for sale only by hair salons; the retailer counterclaimed on antitrust grounds. *Id.* at 589. The court dismissed the antitrust claim noting:

> It is undisputed that ever since a time long before the events at issue Matrix had a consistent policy of selling its products only through salons because this assured the concurrent availability of cosmetologist consultation, either, as Matrix has asserted, to enhance appropriate product selection, or to enhance product public image.

Id. at 594. Thus, even if Viazis was to be believed over GAC as to the test case issue, it was clear that GAC was uncomfortable with direct advertising long before it disassociated from Viazis.

Viazis weakly tried other means to thread GAC into his alleged conspiracy involving the AAO, SWSO or other orthodontists acting alone or as a group. Viazis contended he could implicate GAC because of the "unwritten rule" in the orthodontic industry against direct advertising. Viazis asserted:

> ... there's no end to the conspiracy under Plaintiff's theory...[L]et's assume...what happened was that GAC knew of this unwritten rule, which I think is clear in the record that, you know, orthodontists do not advertise comparatively, directly to the public, number one. Number two, Viazis violated the rule. Number three, GAC decided that it was going to have to punish Viazis because it knew, as Dohn says directly in the letter, Viazis was going to be subjected to peer sanction, and because GAC reasonably anticipated the loss of the – of its investment. GAC, knowing that this rule had been violated, decided that it would sanction Viazis...because they knew...they would be accused of violating this rule or supporting an orthodontists who did.

Viazis appears to have argued that the Defendants' behavior for much longer than the pendency of the events at issue has not been independent but "consciously parallel" such that it is violative of antitrust law. That is, he appears to have argued that even if no *quid pro quo* collusion existed, everyone knew how to behave, and when Viazis broke that understanding, everyone acted in a parallel way designed to bring Viazis into line.[4]

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[4] In an effort to make sense of Viazis' nebulous and amorphous conspiracy theory, GAC actually submitted a discussion of conscious parallelism as applicable to one conspiracy while the customer complaint cases cited in the main text applied to another. Specifically, GAC argued: "Let's take the conspiracy that says that everyone in the orthodontic industry, including GAC and Mr. Dohn, follow an unwritten rule against comparative advertisement of apparently both products and services. What that is governed by...is an area of the law called consciously parallel business behavior." (Trial Trans. at 1139.) Later, GAC offered: "Now, the second conspiracy that we have here...[-] and it's not a second conspiracy

Royal Drug Co. v. Group Life and Health Insurance Co., 737 F.2d 1433 (5th Cir. 1984) is instructive in debunking Viazis' method. There, a group of independent Texas pharmacies sued the defendant, known as Blue Shield of Texas ("Blue Shield"), under Section 1. *Id.* at 1435 The pharmacies were upset by a Blue Shield program whereby Blue Shield policyholders purchasing drugs from certain pharmacies faced reduced costs as compared to those purchasing from other pharmacies. *Id.* The reduced costs were the result of Blue Shield's entry into Pharmacy Agreements with certain pharmacies whereby those pharmacies agreed not to charge more for drugs than a set amount while Blue Shield reimbursed the participating pharmacy for the cost of acquiring the drugs. *Id.* Blue Shield would only reimburse its policy holders a certain percentage of the costs of drugs obtained from non-participating pharmacies. *Id.* The plaintiffs in the case argued the Pharmacy Agreements violated antitrust law as illegal price-fixing agreements. *Id.* at 1436.

The Fifth Circuit concluded the plaintiffs were asserting a theory of conscious parallelism and explained the showing a plaintiff must make under such circumstances. Specifically, the court wrote:

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but [an] alternative articulation [-]...is whether GAC and Mr. Dohn conspired with a group of its customers to injure Dr. Viazis or to restrain the bracket." (*Id.* at 1142.) "[T]he cases that are most relevant to this conspiracy...are the children cases, the progeny of the United States Supreme Court case of *Monsanto v. Spray-Rite* [including *Culbertson* in the Fifth Circuit]." (*Id.*) Ultimately, however, all roads lead to Damascus here. The *Monsanto* line of cases appear to this Court to impact both conspiracies, or articulations of one conspiracy. They do so, as explained in the main text, in that they remove GAC and Dohn from this case because they show that as a matter of law Viazis did not demonstrate GAC acted collusively on either front.

> The plaintiffs argue that even though Blue Shield does not compete with pharmacies, the uniform contracts entered into separately between competing sellers and a "powerful buyer" nevertheless constitute an illegal horizontal combination. This argument seems to assert a theory of 'conscious parallelism,' under which a combination among drugstore competitors might be established by circumstantial evidence of parallel conduct among the competitors. '[T]wo elements must be established by a plaintiff relying on a theory of conscious parallelism: (1) that the defendants engaged in consciously parallel action, (2) which was contrary to their economic self-interest so as not to amount to a good faith business judgment.' *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980). In order to avoid [judgment as a matter of law] under this theory, the plaintiff cannot rely on proof of parallel behaviors alone; significant probative evidence of conscious parallelism is required, 'with some 'plus' factor which tends to indicate that the asserted unilateral behaviors was not such in fact...' *Paul Kadir, Inc., v. Sony Corp. of America,* 694 F.2d 1017, 1027, n. 27 (5th Cir. 1983).

Id. at 1437. The court concluded the plaintiffs had failed to come forward with significant probative evidence that would have "establish[ed] a fact issue as to whether the participating pharmacies did not act according to independent exercises of their respective business judgments to increase drug sales and customer traffic." *Id.*

In light of the rules cited from *Royal Drug Co.*, the court's discussion *supra* really takes care of any conscious parallelism argument Viazis made here. For instance, in *Lovett*, GM's actions causally stemmed from dealers upset with a fellow dealer cutting prices. Twin Cities dealers were

losing business to the *Lovett* plaintiffs, because the plaintiff dealer engaged in a marketing/price discounting program luring customers from an area outside its APR. Economic common sense, and not any academic course, teaches us that in most markets most sellers prefer higher prices. They have an "unwritten rule" to keep prices as high as they can. A supplier like GM would know this. Nonetheless, the Eight Circuit permitted GM to escape antitrust liability because its customers (dealers competing with the plaintiff) complained about the plaintiff dealer and because the record contained strong competing inferences that GM had pro-competitive reasons for structuring its distribution system. Likewise, the record here could not have led a reasonable jury to believe GAC really acted against its "true" and independent will in a way contrary to its economic self-interest so as not to amount to good faith business judgment about what was in its long-term interest.

Viazis implausibly continues his argument:

> So..., let's say [GAC] acted alone in [dropping Viazis]. And let's say no one else is in the conspiracy at all except the AAO. The AAO could have knowingly continued the harm to the Viazis bracket by continuing the disparagement, the lockout, by sanctioning him to continue to maintain the negative feedback on Viazis and his bracket and to continue to keep the bracket marked out – locked out of the marketplace.

(Trial Transcript at 1170.) This scenario, of course, fails to acknowledge that Viazis failed to supply a connection between GAC and the AAO. Viazis presses on, however, trying to push his thin read by arguing:

> ...it would be reasonable for a fact finder to conclude that there were some orthodontists, certainly some of the [] orthodontists who...testified, who acted to disparage Viazis and the Viazis bracket, who acted to pass on without any knowledge, basis, or without any real basis this so-called ethics sanction to the AAO, and who may have threatened GAC or merely contacted GAC and said, Dr. Viazis has violated the unwritten rule and you need to do something about it.

(Trial transcript at 1171.) Viazis simply failed to show the first element of his Sherman Act case with respect to GAC (or Dohn). Having so concluded, the Court assessed Viazis' concerted action situation with respect to the AAO and the SWSO.[5]

Because unilateral action simply cannot violate Section 1, *Cranfill v. Scott & Fetzer Co.*, 773 F.Supp. 943, 950, n.8 (E.D. Tex. 1991) (citing *Monsanto Co.*, 104 S.Ct. at 1469), Viazis could have presented sufficient evidence that the AAO or SWSO conspired with someone or something else. The Court does not believe he did this. Viazis argued and presented evidence that members of the GDAO met to consider expelling Viazis from the organization based on their

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[5] Viazis attempted to argue the conscious parallelism jurisprudence cited in the main text is inapplicable here, because he has provided direct evidence of collusion with "the Dohn Letter being Exhibit A." (Trial Transcript at 1179.) By the court's reading of the Dohn Letter, it can only reasonably be direct evidence that some of GAC's accounts threatened GAC with a withdrawal of business, Dohn believed orthodontists generally would be extremely unhappy with Viazis' marketing methods, and Dohn thought orthodontists and others involved with the profession talked to each other about matters such as those methods, spreading their views rapidly. (*See* Pl.'s Exhibit 75.) In fact, by the Court's reading the Dohn Letter cannot reasonably be read as much *indirect* evidence of collusion.

stated believe that his marketing methods violated the ethics of the orthodontics profession.

This was little evidence, however, that the GDAO officials schemed in some way with the SWSO or the AAO. The mere fact that GDAO members were also members of the SWSO and AAO cannot create such a scheme. In fact, the Court notes, conscious of its role *vis a vi* that of the jury, that local orthodontists concerned with a peer's marketing methods as violative of their profession's standards could be expected to pass on their complaints to a regional or national umbrella organization. This is what the members of the GDAO Viazis interrogated at trial indicated. (*See* Trial Transcript at 901.)[6]

As Viazis has briefly argued, however, some case law makes it appear that for antitrust purposes a trade group's sanction of a member may be, in and of itself, deemed concerted action for Sherman Act purposes. For instance, in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 115 (3rd Cir. 1988), Nanavati charged the Executive Committee of a hospital with having engaged in a Section 1 violation by voting to deny him staff privileges at the hospital. Despite Viazis' argument, the court believes Viazis did not show sufficient evidence that the mere sanctioning action of the AAO here constituted the requisite concerted action. *Consolidated Metal Products, Inc. v. American Petroleum Institute,* 846, F.2d 284 (5th Cir. 1988) is important to the Court's view. There:

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[6] Interestingly, Viazis really didn't say much about the SWSO. He did note that Dr. Geller, one of the attendees at Viazis' now fabled seminar, was its president-elect at the time. Indeed, none of the parties really focused on the SWSO. The Court believes it could not have been liable here if the AAO was not. Thus, the Court has, for the most part, viewed both the AAO and SWSO in the same light.

> Consolidated Metal Products, Inc., a manufacturer of oil well equipment [("Consolidated")], contend[ed] that the American Petroleum Institute ("API"), a trade association representing all sectors of the domestic petroleum industry, delayed trade standard certification to certain equipment manufactured by Consolidated and thereby excluded it from the market in violation of [S]ection 1 of the Sherman Act.

Id. at 286. The district court granted summary judgment and the Fifth Circuit affirmed the district court. *Id.*

In doing so, the panel noted various facts highly similar to facts and allegations in this case but most significantly, the Fifth Circuit rejected the idea that a trade association is always a "walking conspiracy." The court wrote:

> [A] trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade. In particular, it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations.
>
> To survive summary judgment on the issue of conspiracy, the plaintiff must present evidence that tends to exclude both the possibility of conduct consistent with permissible competition and the possibility that the alleged conspirators acted independently. API's delay in licensing its monogram..., even if hindsight shows it to be unjustified, is not enough in itself to fall within the forbidden category. It is axiomatic that trade standards must exclude some things as substandard and it is unsurprising that standard-setting bodies sometimes err.

Id. at 293-94 (citations omitted). The court further noted that the plaintiff offered no evidence to suggest [API's] certification program was a "mere[]...ploy to obscure a conspiracy against competing producers." *Id.* at 294. The court thought the product standard at issue reasonable on its face. *Id.*

Similarly here, Viazis failed to present evidence from which a reasonable jury could have concluded the AAO's advertising rules were a mere sham designed to suppress all advertising directly to the public.

Viazis' evidence did not show the AAO's proceeding in and of itself to have been a sham anymore than Viazis has sufficiently shown the AAO to have colluded with others. Like API, the AAO may have been hasty or erred. Moreover, it is hardly inconsistent with competition for a professional medical association to wish input into devices its members will use. The AAO does not, after all, deal with widgets. Finally, the AAO's advertising rules on their face seem eminently reasonable and in no way designed as a sham. In relevant part, they read:

> Members shall ensure that no communications are false, deceptive or misleading in any material respect when utilizing public statements, announcements of services and promotional activities for providing information to aid the public, patients and other health care providers in making informed judgments.

(Trial Transcript at 340). Hence, the Court believes Viazis not only failed to show collusion between entities, groups or individuals and a group or groups, but that he failed to make

out the conspiracy element with regard to the associations acting as bodies of independent competitors.

B. Unreasonable Restraints on Trade.

Even if the court incorrectly concluded Viazis failed to sufficiently prove a conspiracy involving GAC, Dohn, the SWSO or the AAO, it believes Viazis failed to show the Defendants' actions harmed competition in the requisite manner. This is so because the jury would have to have employed a "Rule of Reason" analysis under which Viazis provided insufficient evidence to conclude competition was harmed. Courts must make this determination as to how the fact-finder is to examine a challenged restraint's impact on competitive conditions. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 627 F.Supp. 105, 110 (S.D. IA 1985). Usually, the Rule of Reason prevails as the analytical method. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980). The scope of the analysis under the Rule of Reason is typically "copious" and a "full and searing" one. *See id.* The "*Per Se* Rule" exists, however, as an alternative mode of adjudging a restraint to be unreasonable. *Id.*

In contrast to the Rule of Reason, the *Per Se* Rule generally applies where, "the challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Northwest Wholesale Stationers, Inc.*, 72 U.S. at 289 (citations omitted). Also, "[t]he decision to apply the [*P]er [S]e* rule [typically] turns on 'whether the practice facially appears to be one that would always or almost always tend to

restrict competition and decrease output...or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 289-90 (citations omitted).

Having exposed this crucial issue, the Court notes that a recent United States Supreme Court case makes it absolutely clear that, where the AAO advertising rules and the AAO's methods of enforcing such rules, the only restraints employed here, a full Rule of Reason analysis would be appropriate. Specifically, in *California Dental Association v. Federal Trade Commission,* 119 S.Ct. 1604, (1999), the Supreme Court rejected the Ninth Circuit's use of an "abbreviated, or 'quick look,' [R]ule of [R]eason analysis designed for restraints that are not *[P]er [S]e* unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown [R]ule of [R]eason inquiry." The Ninth Circuit had believed the "quick look" approach to be proper in analyzing California Dental Association rules prohibiting "false or misleading" advertising by dentists. *Id.* at 1608-09. The Federal Trade Commission had challenged the rules as being applied in such a way as to be restrictions on truthful, nondeceptive advertising in violation of the Federal Trade Commission Act.[7] *Id.* at 1608. The Ninth Circuit's view would have allowed for condemnation of purportedly " 'naked restraint[s]' on price or output without an 'elaborate industry analysis.'" *Id.* at 1609.

The Supreme Court rejected anything other than full blown Rule of Reason analysis in *California Dental*

[7] As noted in the Supreme Court's opinion, the Federal Trade Commission Act's "prohibition of unfair competition and deceptive acts or practices, 15 U.S.C. §45(a)(1), overlaps the scope of the Sherman Act, 15 U.S.C. §1, aimed at prohibiting restraints of trade." *Id.* at 1609, n.3 (citations omitted).

Association due to its belief that the restrictions at issue were not obviously anticompetitive and the special role of professional trade associations in regulating their professions.

That the Rule of Reason must apply to the AAO actions here is also apparent from a comparison of the facts here to those in the *California Dental Association* case. First, Dr. Viazis himself stated at trial that he had attempted to comply with the AAO's ethical canon on advertising to which he was obligated when he first began the advertising which precipitated the efforts of which he now complains. (Trial Transcript at 340.) The canon sounds strikingly like the advertising rules of the California Dental Association. Second, the AAO held a disciplinary hearing with respect to Viazis' purported violation of its advertising canons. (Trial Trans. at 396-400.) While the *California Dental Association* case involved the FTC challenging the rules of the association, those same rules provided for hearings apparently similar to the one Viazis underwent. *California Dental Ass'n,* 119 S.Ct. at 1608. Finally, just as Dr. Viazis was suspended for one year, California Dental Association members who were "recalcitrant" in refusing to withdraw or revise objectionable advertisements could be subject to censure, suspension, or expulsion from the association. *Id.* In fact, Dr. Viazis testified that he was offered a choice of a hearing with respect to his ads or a self-enforced punishment – the withdrawal of some of his ads. (Trial Transcript at 400-01).[8]

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[8] Viazis testified he did not know at the time he was given a choice between accepting punishment or having a hearing over what the punishment would be; he only later learned through discovery that had he accepted punishment, there would have been a recommendation of punishment consisting of the withdrawing of some of his ads. (Trial Transcript at 400).

The allegations against GAC complicate matters just a bit, but the Court believes that ultimately the Rule of Reason would have to have been applied to the entirety of Viazis' allegations despite such involvement. Frequently, courts determine the *Per Se* Rule applies to restraints involving entities or persons in a vertical relationship acting together to boycott others competing horizontally with some of those acting together. *See Constr. Aggregate Transp., Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 772-76 (11th Cir. 1983). Depending on the particular situation, these arrangements can be the "naked" restraints that are the target of the *Per Se* Rule. *See Id.*

This situation, however, is different. At its root, Viazis's alleged conspiracy is about the AAO, SWSO or unnamed members of the orthodontic profession acting to punish him for his supposed breach of the profession's standards of conduct. That they used GAC as one of their tools really does not change the character of their conduct. As such, the Court believes *California Dental Assoc.* is really on point even with respect to the layer of restraint GAC is charged with having added to the grand conspiracy. Indeed, in ruling against the Ninth Circuit's quick look analysis, the Supreme Court opined:

> The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*[P]er [S]e,*' 'quick look,' and '[R]ule of [R]eason' tend to make them appear. We have recognized for example, that 'there is often no bright line separating *[P]er [S]e* from Rule of Reason analysis,' since 'considerable inquiry into…market conditions' may be required before application of any so-called '*[P]er [S]e*' condemnation is justified.

California Dental Ass'n., 119 S.CT. at 1617 (citations omitted).

A logical "extension" of the *California Dental Association* case is not alone, however, in suggesting this is in no way a *Per Se* case. *Northwest Wholesale Stationers, Inc.*, 72 U.S. at 294 (citations omitted) teaches:

Cases to which [the Supreme Court] has applied the *[P]er [S]e* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing supplies or customers to deny relationships the competitors need in the competitive struggle.'

Also, "[i]n these cases, the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete...and frequently the boycotting firm possessed a dominate position in the relevant market." *Id.* (citations omitted). Finally, "the practices [at issue] were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Id.* The question then, should be whether GAC was a relationship, essential facility or firm possessing market power that Viazis needed in the competitive struggle.[9] As the Court's discussion *infra* concerning the mechanics of

[9] The Court notes that orthodontists were not competitors of Viazis in the orthodontics bracket market. That is, they competed with him in providing orthodontic services. Viazis claimed damages, however, in the orthodontics bracket market. Thus, a common indicator of a *Per Se* situation, defendants competing with a plaintiff in the allegedly harmed market, is missing here.

the Rule of Reason shows, it could not have been such a relationship.[10]

Having concluded the Rule of Reason applied here, the court turns to a discussion of what Viazis was required to show under it before proceeding to illustrate his failure to do so. Under the rule, Viazis had to have presented sufficient evidence that the Defendants' actions "had an anticompetitive effect in the relevant market." *Muenster Butane, Inc. v. Stewart Co.,* 651 F.2d 292, 295 (5th Cir. 1981). Because Viazis claimed in the Joint Pre-trial Order at 6 that the "Viazis' [sic] bracket has been cut-off from the market for orthodontic brackets," he was required to present a threshold level of evidence on the competitive harm to such orthodontic brackets market."[11]

The competitive harm to a relevant market necessary to make out an antitrust violation involves several key facets. Significantly, the required showing under the Rule of Reason does not concern itself with effects on a particular plaintiff, but, rather with effects on the *relevant market* as a whole. *See Muenster Butane, Inc.*, 651 F.2d at 296. Further:

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[10] The court notes Viazis submitted two cases for the proposition that the use of a trade group to effect a group boycott has been termed a *Per Se* violation. *See Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.,* 81 St.Ct. 365 (1961) and *Silver v. New York Stock Exchange,* 83 S.Ct. 1246 (1963). The Court reviewed these cases, and as a preliminary matter, believes them to be distinguishable. Moreover, the much more recent *California Dental Association* and *Northwest Wholesale Stationers, Inc.* cases clearly indicate that this is a Rule of Reason case.

[11] Plaintiff must make this showing with respect to a relevant product market and geographic market. *Muenster Butane, Inc.,* 651 F.2d at 295. Plaintiff stated at trial that one of his contested issues of fact and law was "whether the geographic market in issue [was]...the world." (Joint Final Pre-trial Order at 11). Based on the argument at trial, the Court concluded that the relevant geographic market is the world.

> In order to prove an anticompetitive effect on the [relevant] market, the plaintiff may either prove that the defendants' behavior had an "actual detrimental effect" on competition, or …define the relevant market and establish that the defendants possessed power in that market.

Levine v. Central Florida Medical Affiliates, Inc. 72 F.3d 1538, 1551 (11th Cir. 1996) (citations omitted). Finally, actual detrimental effects in a given market are typically shown by proving an increase in prices in such market or a reduction in output; reduction in output encompass changes in both quantity and quality of output. *See, Federal Trade Comm'n v. Indiana Fed. Of Dentists,* 106 S.Ct. 2009, 2018-19 (1986); Alan J. Meese, *Farwell to the Quick Look: Redefining the Scope and Content of the Rule of Reason,* 68 ANTITRUST L.J. 461, 494 (2000); Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* Volume XI, §1912c4, Pg. 290-294.

Viazis made neither showing described in *Levine* with the requisite force. First, Viazis did not make a sufficient showing of harm on the basis of a marketwide output reduction. To be sure, the record contains evidence that the Viazis bracket may be a unique and innovative new type of orthodontic device exceeding, in some senses, the quality level of competitive products. If a sufficient showing were made suggesting that such quality product was either completely or substantially kept off the market, then, it might be reasonable for a jury to conclude market wide output had been impacted either from a quantity or quality standpoint.[12]

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[12] This would be the case, because total or near total exclusion of a truly innovative product could have two market wide output detrimental effects: (a) insulating other products already in the market from quality-based competition or (b) preventing introduction of an item that could stimulate

Viazis did not, however, introduce sufficient evidence that his brackets were either completely or substantially excluded from the orthodontics bracket market. It is this Court's belief that at most, Viazis may have established that (a) on the seller side of the market,[13] Defendant GAC, which no longer distributes his product, has anywhere from 14-20% share of the brackets market, and (b) on the buyer's side that most orthodontists are not currently buying his brackets.

One problem for Viazis is that even if GAC held a large market share, the vast majority of the worldwide distribution chain in such market was open to him. Viazis tried to counter by offering testimony from various persons that suggested distributors representing the vast majority of the sellers in the brackets market would not work with Viazis. For example, testimony was offered regarding the letter Dohn wrote to Viazis where Dohn stated: "[Y]ou can be sure that GAC's competitors, especially Ormco, will not only spread [news of GAC's affiliation with comparative advertiser Viazis] but distort it to their advantage." (Trial Transcript at 225). Viazis himself testified that he was a pariah to the orthodontic appliance manufacturers and distributors. Viazis presented no evidence, however, that he went to other distributors. Moreover, evidence offered at trial showed that Viazis did in fact have brackets market access.

Such evidence suggested that Viazis' bracket thrived in the brackets market such that marketwide output was not

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interest in the product category as a whole thereby suppressing production of the item in the market as a whole.

[13] The parties do acknowledge that the brackets market largely consists of manufacturers/distributors on one side as sellers and medical professionals – orthodontists and dentists- buyers' side (Trial Transcript at 570). The ultimate recipients of orthodontic brackets, the patients, participate in the market for orthodontic services.

harmed quantitatively or qualitatively. For one, Viazis has had a relationship with new companies marketing primarily to dentists that have acted as his distributors since GAC stopped functioning in such capacity. (Trial Transcript at 415.) Additionally, Viazis acknowledged at trial that under his present manufacturing arrangement with GAC and his new distribution chain, he makes speaking appearances promoting his brackets, advertises his product, and sees his brackets distributed overseas as well as in the United States. (Trial Transcript at 455-57, 570-72.) Further, he acknowledged that his revenues from bracket sales have climbed since GAC "dropped" him. (Trial Trans. at 457-58, 588.)

Indeed, case law also suggests Viazis' attempts to show exclusion were hollow. First, the *Levine* court rejected a claim by a doctor that his being excluded from certain but not all healthcare delivery entities in a certain geographic market for physician services restricted competition. *Levine* 72 F.3d at 1551. In doing so, the Levine court wrote that: "Although Healthchoice and CFMA denied him membership, Dr. Levine had no trouble establishing a booming practice." *Id.* *Consolidated Metal Products, Inc.* 846 F.2d at 295-96 also hurts Viazis' harm to competition case. There, the court acknowledged "the API monogram is very important to buyer acceptance of [Consolidated's equipment]." *Id.* at 295 The court noted, however, that there was no evidence API forced buyers of oil field equipment to refrain from buying non-certified equipment. *Id.* at 296. Also:

> Although there is some danger that API could use its influence to reduce competition, this danger is small so long as users rely voluntarily upon the API monogram. If users choose freely to rely on API approval, API has influence principally because it has done a good job evaluating products. If API fails to evaluate products

> accurately, consumers free to sample non-monogrammed goods will gradually discover the monogram's diminished usefulness and cease relying on it. Thus the greatest threat to competition is in the sort run, before a significant number of buyers shop around. Even this threat is mitigated to the extent that producers of unmonogrammed equipment have alternative means of reassuring consumers of the quality of their products. They may for example, offer warranties, commission product tests by someone other than API.
>
> Here, however, Consolidated had no trouble gaining acceptance of its product even in the short run; it was able to sell substantial amounts of its [product] as soon as production began.

Id. at 296-97.

Viazis openly admitted that dentists are customers in the brackets market and that he is having phenomenal success in selling to them; he thus eroded his ability to claim he has been excluded from the relevant market.

In addition to not showing an impact on marketwide output by means of a lockout or otherwise, Viazis failed to make a sufficient showing of harm to competition based on proof relating to prices in the orthodontic brackets market. In fact, as a preliminary matter, one of Dr. Viazis' witnesses a dentists using his brackets, testified that Viazis' brackets actually cost more than other brackets. (Trial Transcript at 707.) Viazis did, however, offer expert testimony regarding the effect of the rapid diffusion of the Viazis bracket on the price and quality of competing metal brackets. His expert agreed in response to a question at trial that "the conduct of Defendants...harmed consumers in [the orthodontic brackets market]," and that consumers in the bracket market would be

harmed by "the suppression of a cost saving innovation." (Trial Transcript at 859-69.) This testimony was not sufficient, however, because it offered nothing more than bare conclusions. Per the United States Supreme Court in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2598 (1993), "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law…it cannot support a jury's verdict."[14]

As discussed *supra, Levine* demonstrates that Viazis could have alternatively showed competitive harm through a showing of the Defendants' market power. Again then, GAC did not control more than 20% of the brackets market and Viazis admits exclusion from that portion of the market would not be sufficient to show the requisite harm to competition. (Trial Transcript at 1177.) Consequently, Viazis had to make a sufficient showing of the AAO's market power in the orthodontic brackets market. *Realty Multi-List, Inc.*, 629 F.2d at 1370 (citations omitted) provides guidance on showing association market power. There, the court found two factors key to finding such power: "First, one can access the degree to which the association is involved in its member's business…," and "[s]econd, one may determine whether the association possesses sufficient economic power 'to shape and influence the economic environment of [the] particular field involved.'"

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[14] Viazis did offer evidence that suggested harm to consumers in the orthodontic services product market, but unfortunately none of it explained the relationship of such harm to the brackets market. Several of his witnesses suggested that Viazis' brackets were such innovative orthodontic appliances that they would substantially reduce the time patients would have to spend in orthodontic treatment, and thereby lower overall costs of such treatment. An argument could be made that such lower costs would stimulate demand for such services and thereby affect the demand for products serving as inputs to producing orthodontic services such as brackets. Unfortunately for Viazis, none of those witnesses explained this relationship.

Viazis presented insufficient evidence of the SWSO/AAO's market power. As noted *supra*, he did offer evidence from Dohn that the AAO has tried to insinuate itself into the orthodontics equipment market by pre-approving products. Dohn stated, however, that the orthodontic manufacturers had resisted the AAO's efforts. Moreover, any influence on the brackets market the AAO wields by virtue of its membership consisting of the buyers' side of the brackets market is to be expected and natural. Of course a trade association will always have some influence on its members' perceptions. API did in *Consolidated Metal Products, Inc.* and so did the AAO here. Such common sense, however, is not proof that the AAO so shaped the brackets market that Viazis demonstrated an unreasonable restraint on trade. Finally, the Court is reminded by the United States Supreme Court that "an inquiry into market power…is but a 'surrogate for detrimental effects.'" *Indiana Fed. of Dentists,* 106 S.Ct. at 2019. The idea that a jury could have found competition in the brackets market was harmed by the AAO's market power then, is simply overwhelmed by the contrary proof discussed *supra.*

Before concluding, however, the Court briefly addresses Viazis's responses to Defendants' harm to competition arguments. As a major part of this, Viazis asserted *Indiana Federation of Dentists.* Mostly, he appeared to argue that the case, along with other cases, stands for the proposition that actual exclusion from a relevant market obviates the need for a plaintiff to show detrimental effect or a defendant's market power. The proposition is logical enough.

Unfortunately for Viazis, an examination of the case demonstrates Viazis could not rely on it or others like it. In the case, a group of dentists banded together in a federation which promulgated a rule that *no* member could submit

patient x-rays to dental insurers in conjunction with claim forms. 106 S.Ct. at 2013-14. *Nearly 100%* of the dentists in certain local communities belong to the federation. *Id.* at 201. The Federal Trade Commission found a violation of Section 5 of the Federal Trade Commission Act based on the notion that the federation's rule amounted to an illegal Sherman Act Section 1 conspiracy. *Id.* The commission found anticompetitive effect even without a showing that the rule led to a higher costs to insurers or patients, *Id.* at 2014-15, but the Seventh Circuit reversed the FTC, because the court felt the record lacked key indices of competitive harm. *Id.* at 2015.

While the Supreme Court disagreed with the Seventh Circuit, *Id.* at 2016-17, a careful reading of the Supreme Court's *Federal Trade Commission* decision does not, however, weaken this Court's analysis here. The Supreme Court found that "no elaborate industry analysis [was] required to demonstrate the anticompetitive character of...[the] agreement [at issue]," because "[a]bsent some countervailing procompetitive virtue...such an agreement... [could not] be sustained under the Rule of Reason." *Id.* at 2018. The Supreme Court further explained that: "[A]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *Id.* at 2019. In noted, however, that even if the Indiana federation agreement was not "naked" enough, "[f]ederation dentists constituted heavy majorities of the practicing dentists and that...insurers [in the areas populated by federation dentists] were...*actually unable to obtain compliance with their requests* for ...x-rays." *Id.* (emphasis added). Finally, the Supreme Court rejected the Indiana dentists' argument that the FTC had failed to show increased dental costs, because:

> A concerted and effective effort to withhold...information desired...for the purpose of determining whether a particular purchase is cost

> justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices…

Id.

As the Supreme Court's statement make apparent, the Supreme Court viewed the factual record as facially showing the Indiana dentists with market power, output in the relevant market actually being reduced, and costs likely having been increased. In other words, it was obvious that when almost 100% of the dentists there were engaged in the effort to prevent insurance companies from receiving the cost analysis x-rays they had specifically desired, output and price in the relevant marker were impacted. The Court's lengthy discussion *supra* shows no such similarly transparent situation here. In fact, most of Viazis's other citations in response to the Defendants' motions on harm to competition are more of the same, and, thus, the Court will not take up more space in the body of this already lengthy opinion and order to expose their failure to alter the Court's decision.[15]

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[15] First, in *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1002 (6th Cir. 1999), the plaintiffs accused the defendants of, among other things, a Sherman Action Section 1 violation. Specifically, Re/Max accused two local northeast Ohio real estate agencies of conspiring against Re/Max by offering Re/Max agents a lower split of commissions from sales of homes listed by the agencies to buyers represented by the Re/Max agents. *Id.* Although the Sixth Circuit ultimately held against Re/Max on its Section 1 claim, as with *Indiana Federation of Dentists,* there had been much more obvious showing of market power in the record than that present here. *Id.* at 1003, 1015. Second, in *Realty Multi-List, Inc.* 629 F.2d at 1357-58, the United States challenged the membership criteria of a multiple listing service in Muscogee County Georgia as being violative of Section 1. Viazis's counsel pointed the court to the Fifth Circuit's statement that:

> While '[t]he issue of market power is inescapably present in any inquiry about impact on competition,'…the question before us is

C. INJURY IN FACT

Finally, the Defendants base their motions on Viazis' alleged inability to demonstrate that any injury he suffered was attributable to their conduct. GAC and Dohn argued that Viazis' injuries could not be attributed to any alleged antitrust violations because Viazis agreed to restructure his relationships with GAC in an agreement signed in mid-1997, but effective January 1, 1997. That is, they claimed Viazis' damages are based on revenues he would have received had his old contractual relationship with GAC remained in place and had his sales to large numbers of orthodontist customers continued. (Trial Transcript at 154-56.) The SWSO and the AAO agree with this but also note their belief that the modification also meant that their disciplinary actions could not have caused Viazis any losses. (Trial Transcript at 1136.)

The Court did not agree with Defendants because it believes Viazis' case with respect to this third element is

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> not whether [the listing services] has a monopoly in the relevant market; rather we must determine whether [the listing service] is of 'sufficient economic importance that exclusion results in the denial of opportunity to compete effectively on equal terms.'

Id. at 1373 (citations omitted). Apparently, Viazis hoped to suggest that GAC or the AAO were sufficiently important to his efforts to sell into the orthodontic bracket market that their action denied him the opportunity to compete in such market. It is obvious the Court's discussion in the main text makes plain that this language could not have saved Viazis' harm to competition case. Finally, the rest is more of the same. These include: a case having no precedential weight because it was vacated pursuant to a settlement agreement, *Great Western Directors, Inc. v. Southwestern Bell Telephone Co.*, 63 F.3d 1378, 1386 (5th Cir. 1995), *modified,* 74 F.3d 613, *vacated pursuant to settlement agreement* (August 21, 1996), *cert dismissed,* 117 S.Ct. 26, *Fineman v. World Armstrong Indus.*, 980 F.2d 171 (3rd Cir. 1992); *Rebel Oil Co. v. Atlantic Ritchfield Co.*, 51 F.3d 1421 (9th Cir. 1995); *Ball Mem'l Hosp. Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986).

inextricably linked to his concerted action charges. In this regard, the Court notes that if GAC is taken out of the conspiracy, a reasonable jury could not have found the requisite causation against the associations. Viazis' and others' testimony made clear that any orthodontist refusal to deal with Viazis was accomplished before the AAO's disciplinary process against him was materially underway. First, Viazis sent his mailer and held his Plano seminar, which various Plano orthodontists attended at the beginning of May 1996. Second, GAC's Dohn wrote Viazis the letter that presaged the disassociation between Viazis and GAC on May 8, 1996. Third, Viazis lost his initial agreement with GAC in an agreement effective as of January 1997. Fourth, the GDAO forwarded its compliant to the AAO in June 1997.[16] Fifth, the AAO notified Viazis of its involvement in July 1997. Sixth, a hearing on Viazis' case was held in November 1997. Finally, Viazis' suspension began in December 1999.

It is from the date of the Plano seminar and the Dohn Letter that Viazis has argued his troubles with orthodontic manufacturers and orthodontists and hence his lockout from the market essentially began. In deed, Viazis testified that from 1997 onward, he had lost virtually all his orthodontist customers. (Trial Transcript at 592-93). Thus, a reasonable juror could not find that Viazis was locked out of the orthodontics bracket market based on the refusal of sellers or buyers in that market to deal with Viazis arising out of any formal AAO action as he was already "locked out."

If GAC did collude with the AAO, however, or colluded with orthodontists acting independent of the AAO in

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[16] Viazis testified that the GDAO actually met shortly after his seminar in 1996. He acknowledged that a motion to expel him from the GDAO was tabled at such meeting. (Trial Transcript at 542.) Further, Viazis agreed that the GDAO's Claude Stephens actually wrote the AAO about Viazis in June 1997 (*See id.* at 543.)

a conspiracy the SWSO and AAO later joined, the Court believes he presented sufficient evidence of causation against all the Defendants. This is so because any serious efforts to restructure the relationship did not come until September 1996 when Viazis wrote the letter to GAC suggesting a voluntary restructuring of the relationship would be mutually beneficial. Of course, Viazis now claims he did not mean to suggest he was truly voluntarily desirous of changing his arrangements with GAC. The Court does not believe this to be crucial, however, because it believes Viazis presented evidence that GAC essentially restructured the relationship by failing to adhere to contractual terms in place long before its agreements with Viazis were formally and completely restructured. Indeed, Viazis' presentation of evidence that he lost the orthodontist portion of the market for orthodontic brackets before the parties provided for the marketing relationship to change makes this apparent. (*See* Trial Transcript at 458.)

IV. Conclusion.

Because Viazis failed to show the requisite concerted action by GAC, Dohn, the SWSO or the AAO or harm to competition in the orthodontic brackets market, a reasonable jury could not find for him on his one and only claim remaining against the Defendants. Consequently, such claim is dismissed with prejudice.[17]

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[17] It should be noted that the Court received a letter dated June 6, 2001 from Viazis' counsel wherein such counsel submitted that this Court should "reconsider its oral pronouncement of its intention to dismiss this action," in light of *Spectator's Communication Network, Inc. v. Colonial Country Club,* 253 F.3d 215 (5th Cir. 2001). He failed to illuminate the Court as to what specifically in this case should change the Court's "mind." Nonetheless, the Court has reviewed the case, and presumes Viazis has called attention to this holding: "[T]here can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into

IT IS SO ORDERED.

SIGNED this 24th day of September, 2001.

By: /s/
PAUL BROWN
UNITED STATES DISTRICT JUDGE

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knowingly curtailing competition by another conspirator who has an anticompetitive motive." *Id.* at 222. This language does not detract from the Court's analysis and application showing, based on precedent such as the *Culberson* case and others, than sufficient evidence was not presented to show that GAC was coerced or enticed by anyone into disassociating from Viazis.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ANTHONY D. VIAZIS, et al.	§	
Plaintiffs,	§	4:98-CV-245
	§	
VS.	§	
	§	
AMERICAN ASSOCIATION OF	§	
ORTHODONTISTS, et al.	§	
Defendants.	§	

ORDER

On this day came on for consideration the Motion in Limine of Defendants GAC International, Inc. and Leo A. Dohn to Exclude Evidence of Threats Made by GAC Customers as Reflected in Dohn's May 8, 1996 Letter and Incorporated Memorandum of Law, the Plaintiffs' response, and the reply to such response, and the Court is of the opinion that the motion should be denied.

STANDARD

Defendants seek to exclude from the evidence that may be offered at trial a certain statement contained within a letter written by Defendant Leo A. Dohn ("Dohn") to Plaintiff Anthony D. Viazis ("Viazis") on the grounds that such statement is inadmissible as hearsay. Additionally, Defendants contend that introduction of the statement would be confusing and prejudicial. Pursuant to FED. R. EVID. 802:

"Hearsay is not admissible except as provided by [the Federal Rules of Evidence] or by other rules prescribed by the Supreme Court...or by act of Congress." Also, "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). A "statement" may be an oral or written assertion and a "declarant" is a person who makes a statement. FED. R. EVID. 801(a) and FED. R. EVID. 801(b). Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury..." FED. R. EVID. 403.

ANALYSIS

Because Plaintiffs are correct in their assertion that the statement at issue is not hearsay under FED. R. EVID. 801(d)(2)(B) and because the statement is highly relevant evidence that would not be unduly prejudicial or confusing, GAC International, Inc.'s ("GAC") and Dohn's motion to exclude such statement must be denied.

Defendants Dohn and GAC erroneously object to introduction into evidence of the following statement contained within the May 8, 1996 letter of Dohn to Viazis: "A number of major accounts in the Dallas/Fort Worth area have threatened GAC they will never again purchase from GAC." (Dohn's 5/8/96 letter to Viazis, Tab. 3 of Pls.' Ap. Supp. Resp. to GAC's and Dohn's Mot. Summ. J.) While Plaintiffs do not contest that ordinarily the statement would be hearsay as offered – to prove that the threats were made, Plaintiffs contend the statement is not hearsay since it is an adoptive admission of Dohn and GAC. FED. R. EVID. 801(d)(2)(B) provides that a statement is not hearsay if "[t]he statement is offered against a party and is a statement of which the party

has manifested an adoption or belief in its truth." On the surface of the situation, Plaintiffs seek to offer the statement against party opponents and the fact of Dohn's May 1996 letter to Viazis in which the statement resides indicates Dohn's (and consequently GAC's) belief in its truth.

A careful reading of the May 1996 letter demonstrates that Dohn and GAC believed threats had been made. Writing on GAC letterhead and as Chairman and Chief Executive Officer of GAC, Dohn informs Viazis of various matters including that threats have been made against GAC by GAC's accounts (orthodontist), that GAC's accounts linked GAC with Viazis, and that GAC's accounts were greatly upset with certain actions of Viazis. (Dohn's 5/8/96 letter to Viazis, Tab. 3 of Pls.' Ap. Supp. Resp. to GAC and Dohn's Mot. Summ. J.) Moreover, Dohn cites such matters, among others, in leading up to a line where he writes: "GAC will stop immediately the distribution of any literature with the use of...the name "Viazis" [and] [a]fter [a trade show] [GAC] will consider dropping [Viazis'] product entirely." *Id.* Dohn also expressed GAC's desire that Viazis cease lecturing under GAC's auspices and that Viazis destroy all literature in his possession and "cease any promotion or seminars using the comments in [the literature]." *Id.* Thus, it is apparent that Dohn was concerned by and believed in, among other things, threats made by GAC's accounts and took action against Viazis as a result of his concern and belief.

Defendants' contentions with respect to the application of FED. R. EVID. 801(d)(2)(B) do not sway this Court from its opinion that Dohn's recitation of threats made constitutes an adoptive admission. Defendants do rightly note that "[p]roof that Dohn agreed with the statement [sic], *or* that circumstances were such that Dohn's failure to contradict it [sic] evidences acquiescence, is required to establish the threats qualify as adoptive admissions." (emphasis added). (Mot. Lim. Defs. GAC and Dohn Exclude Evid. of Threats by

GAC Customers Reflected in Dohn's 5/8/96 Letter at 2.) The complete contents and structure of the letter and GAC's action memorialized by it are the proof that Dohn believed in the truth of the matters asserted in the statement sought to be excluded. Thus, because Defendants admit in their motion that "the letter may constitute an adoptive admission" and because the Court finds the statement as to threats also constitutes an adoptive admission, the court will admit the letter in its entirety.

IT IS SO ORDERED.

SIGNED this 1ST day of November, 2000.

By: /s/
PAUL BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX E

185 Oval Drive
Islip, N.Y. 11722-1402

May 8, 1996

Dr. Anthony Viazis
2317 Coit Road Ste D
Plano TX 75075

Dear Dr. Viazis:

I am greatly disturbed by the unprofessional manner in which you are promoting your Plano, Texas office. A number of major accounts in the Dallas/Ft. Worth area have threatened GAC they will never again purchase from GAC. They believe GAC is behind your promotion because of your unauthorized use of GAC's "BioEfficient® Therapy" logo and knowing we support your courses. Direct advertisement of a medical/dental device intended for use by a professional to the general public is considered the greatest breach of professional etiquette in orthodontics. When 3M tried to promote Transcend via television to the general public, the profession became hysterical. Ever since that event, AAO has been trying to insist that all new techniques and products be submitted for AAO or ADA approval before marketing. The industry has resisted this attempt to control entry of new products and ideas, but I fear our efforts will ultimately fail. It is obvious from the comments we have heard that the whole subject will again be brought up, if not in Denver, at the next Orthodontic Materials Committee meeting this fall. Since I sit on this committee, I can expect to hear some very sharp comments both from the AAO members and fellow suppliers.

Worse, in this case, they are correct. The public pays a professional to use his best judgment in treating them. Your brochure "A New Era in Orthodontics Has Begun", publicly casts doubt about your fellow professionals' ability and judgment. The reference to "reduce the potential for damage to the root of the tooth" could be construed as libelous. If you do not have uncontestable proof that your technique does no damage, while other techniques bring harm, you can expect severe repercussions. Charley Schultz tells me some of your neighboring professionals are already looking into possible legal or professional action. Worse, Charley told me that he warned you before your May 4th Plano seminar that you should not make such comments verbally or in print.

Until now I have admired your enthusiasm, aggressiveness and ability. I understand your impatience with an, at times, overly conservative profession. Just as we are beginning to see independent verification of the merit to the Viazis bracket, your desperate and misfocused attempt to promote your practice has greatly delayed any acceptance of your technique and may have entirely destroyed its future. GAC/Tomy have made a significant investment which now is lost. You may have even seriously damaged our overall reputation and sales, not only in Texas, but the entire country. Word of mouth alone will carry this story across the country, but you can be sure GAC's competitors, especially Ormco, will not only spread the information, but distort it to their best advantage.

GAC will stop immediately the distribution of any literature with the use of the "Bioefficient Therapy" logo or the use of the name "Viazis". After the show we will consider dropping the product entirely. GAC certainly does not want you to lecture under its auspices. Furthermore, we demand you destroy all of the literature you have in your possession and cease any promotion or seminars using the comments in

these brochures. (For your information, six orthodontists attended or had your Plano seminar taped.)

Under no circumstances come near our booth in Denver or attend our Denver reception. There are acceptable and even more efficient ways to promote your practice without criticizing fellow professionals. Charley or I would have aided you, in fact Charley told you he would help, but you took your own advice. Your aggressiveness seems to have turned vindicative. We at GAC/Tomy demand you immediately cease this promotion, which is not only self-destructive, but destructive to GAC/Tomy.

Very truly yours

/s/
Leo A. Dohn
Chairman &
Chief Executive Officer

LAD: jt